83 - 1478

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JERSEY CENTRAL POWER & LIGHT COMPANY,
Appellant,

v.

BOARD OF PUBLIC UTILITIES OF THE STATE OF NEW JERSEY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

SEPARATE APPENDIX TO JURISDICTIONAL STATEMENT

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SUPREME COURT OF NEW JERSEY
C-251 SEPTEMBER TERM 1983

21,691

ON PETITION FOR CERTIFICATION

IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND LIGHT COMPANY FOR AN INCREASE IN RATES AND CHARGES IN THE TARIFFS FOR SUCH SERVICE (BPU DOCKET NO. 804-285)

(Jersey Central Power and Light—Petitioner)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-218/220/227/219/224-82T1 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs and it is further

ORDERED that the appeal in the within matter is dismissed pursuant to R. 2:12-9.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice at Trenton, this 6th day of December, 1983.

STEPHEN TOWNSEND
Clerk

Appendix A-2

SUPREME COURT OF NEW JERSEY
C-252 SEPTEMBER TERM 1983

21,691

ON PETITION FOR CERTIFICATION

IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND LIGHT COMPANY FOR AN INCREASE IN RATES AND CHARGES IN THE TARIFFS FOR SUCH SERVICE (BPU DOCKET NO. 804-285)

(Public Advocate—Cross-Petitioner)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-218/220/227/224-82T1 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Robert L. Clifford, Presiding, Justice at Trenton, this 6th day of December, 1983.

STEPHEN TOWNSEND
Clerk

Appendix B-1

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-162-81T2
A-218-82T1
A-220-82T1
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A-219-82T1
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IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND LIGHT COMPANY FOR AN INCREASE IN RATES AND CHANGES IN THE TARIFFS FOR SUCH SERVICE (BPU DOCKET NO. 804-285)

IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND LIGHT COMPANY FOR APPROVAL OF AN AMENDMENT OF ITS TARIFF TO PROVIDE FOR AN INCREASE IN RATES AND CHARGES FOR ELECTRIC SERVICE AND A REVISION IN DEPRECIATION RATES (BPU DOCKET NOS. 818-726, 818-736)

IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND LIGHT COMPANY LEVELIZED ENERGY ADJUSTMENT (BPU DOCKET NOS. 821-75, 818-726)

Argued: April 19, 1983—Decided: July 28, 1983

Before Judges Matthews, Antell and Francis.

On appeal from Final Decisions of New Jersey Board of Public Utilities.

William F. Hyland argued the cause for Jersey Central Power & Light Company (Riker, Danzig, Scherer & Hyland, attorneys; Kirstein, Friedman & Cherin, Berlack, Israels & Liberman, of counsel; James B. Liberman, Jack B. Kirstein, Edward K. DeHope, on the briefs).

Linda S. Lodenkamper, Assistant Deputy Public Advocate, and Menasha J. Tausner, Deputy Public Advocate, argued the cause for the Public Advocate (Joseph H. Rodriguez, Public Advocate of New Jersey, attorney; Roger L. Camacho, Director, Division of Rate Counsel, of counsel).

Carla Vivian Bello, Deputy Attorney General, argued the cause for Board of Public Utilities (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel).

John C. Sahradnik argued the cause for County of Ocean (Berry, Kagan, Privetera & Sahradnik, attorneys (William E. Conklin, Jr., on the brief).

John M. Quain, admitted *pro hac vice*, argued the cause for American Society of Utility Investors (Milton Lowenstein, attorney).

Edward Lloyd argued the cause for Diane Fahey.

The opinion of the court was delivered by MATTHEWS, P.J.A.D.

These consolidated appeals involve four orders of the Board of Public Utilities which impact upon rates charged by Jersey Central Power and Light Company (JCP&L). Two of the orders involved, that of April 23, 1981 which rejected the Public Advocate's demand for a Board inquiry into the causes of the Three Mile Island nuclear accident, and July 31, 1981 which permitted an increase in JCP&L's annual revenues, are the subject of appeals taken in Docket A-162-81.

During the pendency of Docket A-162-81, JCP&L filed a new rate case with the Board. That case culminated in an order, dated July 22, 1982, in which the rates set in the previous July 31, 1981 order were augmented with new rates based upon the Board's latest analysis of JCP&L's revenue requirements. Similarly, during the pendency of proceedings in Docket A-162-81, JCP&L petitioned the Board for an increase in its Levelized Energy Adjustment Clause revenues (LEAC). That petition resulted in a Board order dated September 2, 1982 permitting an increase in JCP&L's LEAC.

On March 28, 1979, there occurred what has been termed "the worst accident in the history of commercial nuclear power generation" in the United States. Report of the President's Commission on the Accident at Three Mile Island (October 1979). The incident at Metropolitan Edison's (Met Ed's) Three Mile Island nuclear power plant, Unit 2 (TMI-2), located near Harrisburg, Pennsylvania, has had nationwide implications not only in terms of the future of nuclear generation but also with respect to the financial viability of some of the largest public utilities in this country.

While the immediate concerns of public officials understandably focused on the potential health hazards associated with the nuclear accident, those involved in the areas of public utility regulation soon were presented with unprecedented economic issues. The most pressing problem facing those utilities previously dependent upon TMI for power has been the need to locate

and purchase alternate energy. Not only has the damaged TMI-2 Unit remained inoperable, but its companion Unit, TMI-1, shutdown for routine refueling at the time of the accident, has continued in that state by order of the Nuclear Regulatory Commission (NRC).

Appellant JCP&L, a public utility of this State and owner of a 25% interest in the Three Mile Island facility, was a TMI-dependent utility which has directly experienced the economic impact since the event of March 28, 1979. Because of the accident, JCP&L has been before the New Jersey Board of Public Utilities on an almost daily basis seeking various forms of relief.

The appeal in A-162-81 arises from an April 29, 1980 filing by JCP&L requesting an increase of $173.5 million in annual revenues. That filing included a request that $60 million of the increased revenues sought be granted on an emergent interim basis. The interim request was heard directly by the Board, while the remainder of JCP&L's rate request was forwarded to the Office of Administrative Law for hearings pursuant to N.J.S.A. 52: 14F-1 et seq.

On May 13, 1980, after hearing testimony related to JCP&L's interim rate request, the Board granted the Company an emergent increase in its base rates amounting to $60 million. In so doing, the Board specifically addressed the Company's dire financial circumstances, noting: (1) that JCP&L was about to exhaust its short-term debt limit under a special revolving credit agreement with bankers; (2) that JCP&L did not possess sufficient coverages to sell long-term debt; (3) that JCP&L's parent company, General Public Utilities, was unable to sell common equity at a reasonable price; (4) that JCP&L lacked sufficient coverages to sell preferred stock, and (5) that JCP&L was unable to finance construction required to ensure safe, adequate and proper service to the public.

Following the granting of interim relief, and while the Company's base rate case was still pending before the Office of Administrative Law, the Public Advocate filed a motion with the Board seeking a moratorium on all future JCP&L rate relief

pending a Board determination as to primary responsibility for the accident at Three Mile Island. A similar motion was filed by Ocean County. On April 23, 1981, the Board issued a lengthy order detailing its position as to what had come to be termed the TMI "fault" issue. In that order, the Board concluded that the granting of the motions for a fault investigation would be "counter-productive to the public interest," "procedurally unmanageable" and detrimental to "those positive efforts under way to share the cost burdens of the TMI accident." Responding to the movants' requests for a moratorium on all future JCP&L rate increases the Board stated:

> [T]he benefit to the customer of receiving reliable electric service requires a utility healthy enough to provide that service. Embarking on a fault investigation of a nuclear accident, a most complex endeavor at best, and freezing currently pending rate cases until such a proposed investigation is completed, is not in the public interest. Such a course could be of no real benefit to the ratepayer, since reasonable replacement power costs must be paid for if ongoing service is to continue.

The Board also noted that a "fault" investigation would add little to the protection already afforded the public by previous Board orders dealing with the rate-making status of TMI-1 and TMI-2. For example, JCP&L's base rates had already been reduced by approximately $46.9 million annually as a result of the Board's removal of TMI-1 and TMI-2 from the Company's rate base. By that removal, the Board insured that JCP&L's ratepayers would not be bearing the double burden of providing the Company with capital and operating expenses related to the nongenerating TMI units while at the same time bearing the cost of replacing energy formerly produced by such units.

The Board found that a fault investigation was not necessary to protect properly the public from undue TMI-related charges, and further that such an investigation might jeopardize the very public interest the movants and the Board sought to serve. Aware of

pending private litigation involving the question of TMI negligence, the Board stated:

> [I]nitiating a fault investigation would be counterproductive to two pending lawsuits where the negligence question will be tried in a proper forum. General Public Utilities commenced action on March 25, 1980 against Babcock and Wilcox in U.S. District Court, Southern District of New York alleging various grounds of negligence, such as defects in design and improper control procedures. Consistent with appropriate regulatory policy, we believe that benefits flowing to the utility system from this lawsuit will be properly allocated to benefit the New Jersey ratepayer. Likewise, the utility system filed suit on December 8, 1980 against the Nuclear Regulatory Commission under the Federal Tort Claims Act alleging negligent acts and omissions by the Staff of the NRC. Consistent with regulatory policy, recoveries from this lawsuit will be allocated to the benefit of the New Jersey ratepayer. *The inappropriateness of using this Board as a duplicate forum to try the negligence of the parties is evident. . . . It is evident that the question of fault is not a simplistic one and will be properly before the Federal Courts.* [emphasis added]

Also bearing upon the Board's decision not to embark upon a unilateral fault investigation was the issue of NRC jurisdiction over the design construction and operation of nuclear facilities:

> [T]he design construction and operation, as well as the development, use and control of nuclear facilities is within the primary if not exclusive jurisdiction of the Nuclear Regulatory Commission. The Pennsylvania Commission stated flatly in its Order dated January 10, 1980, . . . 'The design construction and operation of the nuclear reactor at TMI-II are under the exclusive jurisdiction of the Nuclear Regulatory Commission'. We prefer to conclude that the Federal Atomic Energy Act, 42 *U.S.C.A.* 2011 *et seq.*, vests exclusive jurisdiction in the NRC only over activities reasonably related to the protection against radiation hazards; 42 *U.S.C.A.* 2021(k). But certainly the Atomic Energy Act vests at least primary jurisdiction in the NRC by a pervasive regulatory scheme controlling the development of nuclear energy through the promulgation of

> detailed regulations. Certainly this Board should defer to the expertise of the Federal Body according to the concept of primary jurisdiction in the interpretation of the standards it has set and whether or not the nuclear industry has met these standards in a reasonable fashion. [emphasis added; footnotes omitted]

Finally, the Board noted the futility of conducting a TMI fault investigation if the objective of such an investigation was to exact from JCP&L a penalty should fault on its part be found:

> How can this Board meet its primary statutory obligation to see that safe, adequate and proper service is provided by a viable entity if it embarks upon the road proposed by the movants? The proposed procedure could either result in a morass of conflicting claims or some attribution of management imprudence to JCP&L which, if effectuated in penalties, would jeopardize vital electric service.

In summarizing its fault position, the Board concluded:

> Suffice it to say that we have an out-of-state accident, an overlay of primary federal authority, split ownership of the TMI facilities and management control of the facilities by a Pennsylvania utility. We also have the results of two major fault inquiries [the Kemeny Commission Report of October 1979 and the Rogovin Report of January 1980], which have not been able to isolate any particular cause of the accident. The ground has already been covered with mixed results. . . . We do not see much point in attempting to duplicate these efforts. Such an investigation would serve no public purpose since in the end reasonable replacement power must be paid for at current levels until there is a substantial reduction when TMI-I returns to service. After what we envision to be a protracted and complex proceeding we would still have to balance the customers['] interest in refunds or frozen rates due to the imposition of penalties and the need for a utility viable enough to provide service.

Leave to appeal from the Board's April 23, 1981 order declining to investigate TMI fault was not sought by either the Advocate or

Ocean County. Both the Advocate and Ocean County, however, have made fault the subject of their cross-appeals in the proceeding arising out of the Board's final rate order of July 31, 1981.

Having denied a moratorium on rate increases pending a fault investigation, the Board, on July 31, 1981, after receipt of an Initial Decision from the Office of Administrative Law, issued its final rate order dealing with JCP&L's request for $173.5 million in additional annual revenues. In that order, the Board addressed the usual issues involved in any rate case: rate base, operating income, rate of return and rate design. At issue in this appeal are (1) the Board's findings with respect to the Company's rate base/rate of return, specifically whether the Board properly continued the exclusion of TMI-1 from JCP&L's rate base; and whether the permitted rate of return should have reflected such reduction in rate base, and (2) the Board's findings as to operating income, specifically whether the Board properly treated JCP&L's investment in the abandoned Forked River project.

On the issue of rate base treatment of TMI-1 the record below disclosed continuing uncertainty on the part of the JCP&L as to the eventual return to service of TMI-1. Based upon testimony to that effect, the Board rejected the recommendation of the Administrative Law judge that TMI-1 be returned to JCP&L's rate base:

> [C]ircumstances have not changed sufficiently to warrant TMI-1 being placed back into rate base at this time. There have been many delays in bringing this unit back on line and we continue to support the treatment of TMI-1 as set forth in the Board's Order of April 1, 1980 in Docket No. 795-427. As it is our position that TMI-1 should not be placed back into rate base until restart, we reject that portion of the [ALJ's] Initial Decision which calls for its inclusion. At the time of restart, the Board will consider in expedited proceedings the appropriate rate base and revenue adjustment related to the TMI-1 return to service.

As to the Forked River plant, JCP&L in its initial request to the Board sought the inclusion of this proposed nuclear station in its rate base as "construction work in progress" (CWIP).

JCP&L admitted, however, that uncertainty clouded the future of the Forked River plant and that it was considering whether to (1) proceed with construction of a nuclear unit at Forked River, (2) convert the station to another fuel source, or (3) abandon the project entirely. In November 1980, during the pendency of the proceeding below, the Company announced that the Forked River project was being abandoned.

After announcing the project's abandonment, JCP&L amended its rate request so as to provide for a write-off of its abandonment loss. The Company proposed two rate-making approaches: (1) amortization of its Forked River investment over a 15-20 year period *with* a return on the unamortized portion or, in the alternative, (2) amortization of its Forked River investment over a 10 year period *without* a return on the unamortized balance. The Advocate proposed a 15-20 year amortization of the Forked River loss *without* rate base treatment of the unamortized balance. Similarly, the Board's Staff recommended a 15 year write-off *without* a return on the unamortized balance.

Also at issue with respect to the rate-making treatment to be accorded Forked River was whether the Company should be permitted to include in its calculation of its abandonment loss an "allowance for funds used during construction" (AFUDC), *i.e.*, the carrying charges on the Company's investment accrued after April 4, 1979—the date the Company "temporarily suspended construction. Both the Staff and the Public Advocate opposed the inclusion of AFUDC accrued subsequent to the suspension of actual construction on the project in the calculation of JCP&L's abandonment loss.

In its final order, the Board adopted the Administrative Law judge's recommendation that the Forked River investment be amortized over a 15 year period without a return on the unamortized balance. The Board rejected the Company's inclusion of AFUDC accrued after April 4, 1979 in the calculation of the investment to be amortized.

As to the issue of rate of return, JCP&L's rate of return witness, a security analyst and corporate financial advisor, testified in support of an overall rate of return of 12.5% to 12.75%, based upon a cost of equity ranging from 18.75% to 20%. His recommendation reflected his evaluation of the investors' perception of risk associated with regulatory actions taken in the wake of the Three Mile Island accident, particularly the Board's removal of TMI-1 from rate base. In opposition to that witness, the Public Advocate presented an economic consultant, who calculated a cost of equity in the range of 13.5% to 14.35%, yielding an overall rate of return of 10.28% to 10.46%. In contrast to the positions taken by both the Company and the Public Advocate, the Staff recommended an overall rate of return of 11.03% based upon a cost of equity of 16%.

After reviewing the various positions presented on rate of return, the Administrative Law judge calculated an overall rate of return of 11.21%, based upon a 16.5% cost of equity. That return, in his opinion, approximated the recommendations set forth by the Board's Staff.

In its final order the Board modified the Administrative Law judge's recommended rate of return on equity downward by .5%, thus allowing the Company a 16% return on equity with an overall rate of return of 10.68%. The Board believed that that rate, "the highest ever granted a New Jersey utility," adequately reflected risks facing the Company. The Board also noted that in addition to granting this unprecedented rate of return, it had taken numerous steps in the last few years to assist the Company in dealing with the financial impact associated with Three Mile Island. These steps included, among others: (1) approval of a Revolving Credit Agreement to provide the Company with short-term funds; (2) the allowance of accelerated amortization of a deferred energy balance; (3) Board intervention in federal administrative proceedings involving the pricing of energy sold to JCP&L; (4) Board support for early NRC approval of a TMI-1 restart; (5) Board endorsement of a federal contribution to TMI-2 clean up costs. In light of such continuing supportive

regulatory efforts, an overall rate of return of 10.68% was deemed sufficient. The Board pledged itself "to monitor this level" carefully in subsequent rate filings.

The various adjustments made by the Board in its final order resulted in an increase in appellant's annual revenues of $110,713,000 as contrasted with the $173.5 million requested. JCP&L filed a notice of appeal from the Board's order. Notices of cross appeal from the order of the Board on the issue of TMI fault were filed by the Public Advocate and the County of Ocean. A notice of cross appeal was also filed, *pro se*, by Diane Fahey, one of the customers serviced by JCP&L.

As we have noted, the Board, on June 18, 1979, permitted JCP&L to recover replacement energy costs through its Levelized Energy Adjustment Clause (LEAC).[1]

At the same time, the Board reduced JCP&L's base revenues by 29 million to reflect the exclusion from the rate base[2] of the investment and operating costs associated with the idle TMI-2 unit. This was ordered by the Board so as to avoid inflicting the ratepayer with the double burden of carrying replacement energy costs as well as providing investors with a return upon the non-generating TMI-2 plant. Similarly, when it became apparent that the companion TMI-1 unit, although undamaged in the accident, would remain out of service indefinitely by order of the NRC, the Board by order dated January 21, 1980, removed another $17.9 miilion from JCP&L's rate base, representing the Company's TMI-1 investment. The Board's action in so balancing the impact of TMI upon investors and ratepayers was reviewed and affirmed by the Supreme Court in *In Re Jersey Central Power & Light Co. Petition*, 85 *N.J.* 520 (1981).

1. LEAC is a regulatory process used to adjust consumer rates as a result of fluctuations in fuel costs. A constant LEAC charge is based upon the utility's estimated prospective average 12 month energy costs. This charge is subject to earlier adjustment in the event over-recoveries or under-recoveries are experienced.

2. Rate base refers to investor-supplied plant, facilities and other assets upon which a utility is permitted to earn a return.

Since the Supreme Court's decision in *In Re Jersey Central Power & Light Co. Petition*, the Board has issued four more TMI-related rate orders, as we have noted.

The orders dated July 22, 1982 dealing with a Board ordered increase in JCP&L's base rates, and that dated September 2, 1982 permitting an increase in JCP&L's LEAC revenues, are the subject of the appeals filed by JCP&L, the Public Advocate and others in Docket Nos. A-218,82T1 and A-219-82T1.

On August 11, 1981, JCP&L filed a petition with the Board seeking an increase in annual base rate revenues in the amount of $238.5 million. The matter was referred by the Board to the Office of Administrative Law for hearing as a contested case. At a prehearing conference held before the Administrative Law judge, the Public Advocate and ratepayer intervenor Diane Fahey sought to have the scope of the rate proceeding expanded to include an inquiry into the cause of the accident at the TMI nuclear facility. In response to that attempt to broaden the scope of the proceeding before the OAL, the Board set forth its position as to the relevancy of the TMI fault issue in three letters sent to the Administrative Law judge and all parties in the proceeding. In a November 6, 1981 letter, counsel for the Board stated:

> [I]t is the position of the Commissioners of the Board of Public Utilities . . . that (1) the Board's "Order on Motion," dated April 23, 1981, in JCP&L's previous rate case sets forth at length the Board's decision not to reach an independent conclusion as to TMI-fault while that issue is being actively litigated before various federal agencies and judicial bodies, (2) that the Board's April 23, 1981 Order is, therefore, dispositive of the TMI-fault question in the (present) docket; and (3) the Board's certification of the fault issue in the previous docket and its expression of its position re the fault question in the April 23, 1981 Order, constitute a continuing reservation by the Board of this issue, i.e., the Board has retained jurisdiction over TMI-fault issues.

Again, in a letter to the Administrative Law judge and all parties dated November 13, 1981, the Board responded to a

request by the Administrative Law judge for further argument on the fault issue in connection with the possible recovery of TMI clean up costs:

> The Board relies upon its letter to you of November 6, 1981. The position of the Board is clear and will not be restated in detail here. Suffice it to say that, pursuant to N.J.S.A. 52:14F-8(b), the Board has specifically reserved all policy questions relating to TMI fault issues unto itself and has set forth its policy determinations in its April 23rd Order in Docket No. 804-285. The issue of clean-up costs is inherent in this continuing reservation. However, in order to further clarify the situation, kindly be advised that the Board specifically reserves unto itself and certifies to itself, for notice and hearing as appropriate, that part of the [present] petition which requests increases in rates due to TMI clean-up costs, and all associated proposed arguments, including the Public Advocate's "fault" position and all associated proposed proofs and revenue impacts.
>
> The parties are, therefore, directed to file all further arguments, pleadings or proofs directly to the Board on this issue, for further evaluation by the Board. The Board will consider and evaluate whether a fault inquiry is in the public interest with respect to TMI clean-up costs. N.J.S.A. 52:14F-8(b) vests the agency head with the clear power to conduct its own hearings with respect to this issue. . . .

On December 1, 1981 the Board again wrote to the Administrative Law judge with respect to its reservation of TMI fault issues:

> [P]lease be advised that the Board has certified all arguments and testimony related to the Board's policy on the fault issue. Inasmuch as the Public Advocate has indicated that it intends to make fault-related arguments in connection with the company's proposal to include TMI-2 in rate base, the Board's reservation of the fault issue extends to the TMI-2 rate base issue as well.

In a letter dated November 6, 1981, the Public Advocate urged the Administrative Law judge to ignore the Board's reservation of the TMI fault issues.

Characterizing the Board's declaration of a continuing reservation of the TMI fault issue as "a motion to return the issue of 'fault'" to the Board, the Administrative Law judge, in what he captioned a Procedural Order Decision on Motion, stated:

> As to the Board's assertion that it can take back issues once transmitted, I feel that to state this proposition is the functional equivalent of deciding that the Board can respond to an administrative law judge's procedural order by making the subject matter of that order disappear. This is inconsistent with the view expressed in the "Uniform Administrative Procedure Rules of Practice" [footnote omitted] promulgated by the Chief Administrative Law Judge under a clear grant of statutory authority. . . . Therefore, the Board is powerless to recall a single issue from a transmitted contested case.[3]

He then proceeded to exercise what he believed to be his discretionary authority to determine whether or not the Board could hear the TMI fault issue directly:

> I ORDER, under the exercise of my discretion, that this issue be sent back to the Board, and I characterize the Order as procedural, under *N.J.A.C.* 1:1-9.7(e), and, hence, appealable only to the Superior Court Appellate Division.

The Board prepared to conduct its own hearings with respect to (1) JCP&L's request for restoration of TMI-1 and 2 to rate base with associated operating and maintenance expenses, and (2) JCP&L's request for recovery of decontamination costs associated with the damaged TMI-2 unit. In a prehearing order, dated April 30, 1982, the Public Advocate's claim that a determination as to TMI culpability was necessary prior to the passing on to ratepayers of any accident-related costs was addressed by the

3. The rule of practice referred to by the Administration Law judge was subsequently found to be invalid by the Supreme Court of New Jersey in *In re Uniform Adm'v Procedure Rules*, 90 *N.J.* 85 (1982).

Board. Referring to an earlier order issued by it with respect to recovery of TMI replacement energy costs, the Board stated:

> We have fully dealt with the "fault" issue at length in a previous decision. *In re Jersey Central Power and Light Company*, Decision on Motion, Docket Nos. 95-427, 804-285 and 811-25 (April 23, 1981). We reiterate that decision in which we concluded that the NRC has primary jurisdiction to determine compliance with standards with regard to the design, construction, operation and use of nuclear facilities.

In the April 23, 1981 "fault" decision relied upon by the Board, problems associated with initiating a TMI fault inquiry were analyzed in detail.[4] With respect to overriding NRC jurisdiction, the Board has stated:

> [T]he design construction and operation, as well as the development, use and control of nuclear facilities is within the primary if not exclusive jurisdiction of the Nuclear Regulatory Commission. . . . Certainly this Board should defer to the expertise of the Federal Body according to the concept of primary jurisdiction in the interpretation of the standards it has set and whether or not the nuclear industry has met these standards in a reasonable fashion.

Referring to two investigative reports claimed by the Advocate to simplify the quantification of TMI-fault, the Board stated:

> We . . . have the results of two major fault inquiries [the Kemeny Commission Report of October, 1979 and the Rogovin Report of January, 1980], which have not been able to isolate any particular cause of the accident. The ground has already been covered with mixed results. . . .
>
> The Kemeny Commission Report of October, 1979 utilizing the resources of a staff of 200 experts and the Rogovin Report of January, 1980, utilizing a staff of 100 nuclear engineers and scientists, attributed the accident to a complex of intertwining factors including inadequately designed equipment, inadequate training of personnel,

4. The April 23, 1981 'fault' order referred to by the Board is the subject of the appeal taken by the Public Advocate in Docket A-162-81T2.

> inadequate emergency room procedures, inadequate control room design and a system of divided responsibilities between the manufacturer, the Pennsylvania operator, the Nuclear Regulatory Commission, and the New York holding company. We do not see much point in attempting to duplicate these efforts.

The Board in its April 1981 order had acknowledged that even if it were to succeed in precisely establishing the degree of culpability, if any, attributable to JCP&L the imposition of any resultant penalty or disallowance would necessarily have to be balanced against the public's interest in continued utility service:

> Such an investigation would serve no public purpose since in the end reasonable replacement power must be paid for at current levels until there is a substantial reduction when TMI-1 returns to service.

Even after a fault inquiry, therefore, the Board would:

> [S]till have to balance the customers['] interest in refunds or frozen rates due to the imposition of penalties and the need for a utility viable enough to provide service.

The Board in its April 23, 1981 "fault" decision also expressed its concern for the impact the initiation of a fault inquiry might have upon an already wary banking community upon which JCP&L was exclusively dependent for credit, and also upon possible recovery by ratepayers in related civil litigation involving alleged negligence by Babcox and Wilcox, manufacturers of the TMI reactor.

In addition to the relevancy of TMI-fault, numerous other ratemaking issues were explored at the hearings below. Of those issues, the following are relevant to the present consolidated appeal: (1) the regulatory treatment to be accorded TMI-1 and TMI-2 in the computation of JCP&L's rate base; (2) ratepayer funding of TMI-2 decontamination costs; (3) the appropriate level of rate of return and (4) the appropriate level of the Company's cash working capital allowance.

During the course of the hearings before the Board, JCP&L argued for the return of TMI-1 to its rate base. TMI-1, although undamaged in the March 28, 1979 accident, has remained shutdown by order of the NRC. JCP&L's witness testified that the NRC shutdown order was unlikely to be lifted prior to the resolution of three major issues. Those issues involved (1) the inquiry by the Atomic Safety and Licensing Board as to an incident involving cheating by TMI operators on NRC operator licensing exams; (2) a recent ruling by the U.S. Circuit Court of Appeals requiring an evaluation of psychological distress before a restart of TMI-1,[5] and (3) the discovery of leaks in TMI-1 steam generator tubes.

After evaluating the testimony, the Board reaffirmed its exclusion of TMI-1 from rate base and stated with regard to the criteria to be employed in determining when TMI-1 could appropriately be returned to rate base:

> We adopt the Advocate's position and employ the restart criteria developed in Pennsylvania. As we have stated before, when the unit returns to commercial operation after the NCR issues the necessary approvals, an expeditious hearing process will be instituted, the facility's status, i.e., rate base inclusion will be examined, and if appropriate, will be recognized.

JCP&L also argued before the Board that TMI-2, out-of-service since the accident, should be included in rate base as "Plant Held for Future Use," or, as an alternative, the Company's investment in TMI-2 be amortized. In rejecting this proposal the Board concluded in its July 22, 1982 order:

> After careful review, the Board finds no compelling reasons to alter its policy that the financial impact associated with the TMI accident should be shared by ratepayers and stockholders. The Board has consistently allowed the pass-through of reasonable replacement energy costs to maintain service for the ratepayer. It has disallowed a

5. That decision was unanimously reversed by the Supreme Court in *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, ____ *U.S.* ____ 75 *L.Ed.*2d 534 (1983).

> return on Petitioner's investment in the TMI facilities sitting idle since March 28, 1979, in recognition of what we believe is the equitable sharing of the cost of the accident.
>
> Given the uncertainty of the future of this facility, it would be unfair to ask the ratepayer, who is the innocent victim of this dilemma, to fund both the replacement power and the investment costs. The investor has borne a share of the consequences from the accident as has the ratepayer. We feel that a balance must be maintained in assessing this loss. To make a mid-course adjustment now would, in our opinion, destroy the foundation of the sharing concept which we have carefully fashioned for 2½ years.

JCP&L proposed during the hearings before the Board that it be permitted to recover through rates, 13.8 million annually for five years towards TMI-2 decontamination costs. This amount claimed represented its proportional share of TMI-2 clean-up costs as set forth in the Bradley-Heinz cost-sharing bill pending before the United States Senate. That cost-sharing reflected the recommendations made by Governor Thornburgh of Pennsylvania that TMI-2 clean-up costs should be spread over a broader base and include contributions from not only New Jersey and Pennsylvania ratepayers, but from the federal government and nuclear industry as a whole.

In its July 22, 1982 order, the Board permitted the requested ratepayer contribution towards decontamination costs. The Board also expressed its belief that an indication of its willingness to recognize decontamination costs in rates would encourage further remedial action on the federal level. Finally, the Board noted the "full endorsement of the Thornburgh Plan" by Governor Kean, as well as the public support for the Thornburgh proposal expressed by the Public Advocate.

JCP&L's rate of return witness testified that an appropriate level for a return on equity for JCP&L would be 23% given the increased risk to the common stockholder demonstrated "by the events of 1979, 1980 and 1981." The Public Advocate's rate of

return witness recommended a return on equity of between 14.84 to 15.69%. After reviewing the competing testimony, the Board determined that a return on equity of 17% was appropriate. In reaching that determination, the Board noted that recent long-term "BBB" rated utility bonds were yielding near 18% and "AAA" utility bonds 16%. That data indicated to the Board that the Public Advocate's recommended return on equity of between 14.84% to 15.69% was too low. The Board also took into consideration the fact that JCP&L had very limited access to traditional money and capital markets. While recognizing the need to mitigate the company's long-term capital costs, the Board acknowledged that restoring JCP&L's standing in financial markets "cannot be accomplished in one Board Order covering say the next year or two." Rather, the Company's financial problems would have to be "systematically" dealt with by the Board "in a consistent and realistic way." Referring to its recent decision granting Public Service Electric and Gas a return on equity of 16%, the Board described its award of a 17% return on equity as reflective of JCP&L's higher risk. The Board also suggested ways in which JCP&L's risk factor could be lessened, such as the company's optimum operation of its Oyster Creek nuclear facility and an expeditious restart of TMI-1.

At the hearing below disagreement arose between JCP&L and the Public Advocate concerning the proper methodology to be employed in the computation of the Company's cash working capital allowance. JCP&L, using the approach taken in its previous rate cases and approved by the Board, used the "⅛ method." This method assumes that a utility on a monthly billing cycle experiences an average lag of 45 days (⅛ of a year) in receipt of payment for services rendered. The level of cash working capital necessary to bridge this gap and permit the company to meet its day-to-day operating expenses and financial obligations while awaiting payment for services rendered is then calculated. The Public Advocate through its witness, recommended that the Company's cash working capital be computed based upon a "lead-lag" study he had conducted in an effort to compute the

actual interval between the date the Company renders a service and the date it receives payment for such services. He testified that in conducting his lead-lag study he had used as a data base the Company's 1980 calendar year operations.

Although he utilized 1980 calendar year data for the computation of lead-lags generally, with respect to lead-lags in the area of the Company's gross receipts and franchise tax collections, the witness recommended that such lead-lags be computed from mid-1979.

The Board in its final order disagreed with this recommended departure from the 1980 date base and calculated all lead-lags upon the Company's 1980 calendar year operations. The overall rate revenue impact of this adjustment amounted to $4 million out of total revenues of $1.2 billion.

Following issuance of its July 22, 1982 base rate order, the Board, on September 2, 1982, issued its determination with respect to JCP&L's pending petition for an adjustment in its Levelized Energy Adjustment Clause. Docket A-219-82-T1 involves no challenge to the actual calculation of the company's LEAC but is limited to the question raised by the Public Advocate and other appellants as to the necessity of a TMI-fault determination prior to the passing on of replacement energy costs to ratepayers. Also raised in connection with the LEAC proceeding by the Advocate is the issue of the Board's ability to exclude certain issues from a case transmitted to OAL. Although the Advocate seeks no remedy from the court with respect to any issue excluded by the Board in the LEAC proceeding, other than that related to TMI-fault, it is necessary for a complete understanding of the LEAC portion of this appeal to note the following facts.

During the pendency of JCP&L's main rate case, the Company, on January 29, 1982, filed for an increase in its levelized energy adjustment clause. The matter was referred by the Board to the OAL for hearing. In its January 29, 1982 letter of transmittal, the Board specifically reserved to itself "any and all TMI fault-related issues which any party may raise." On May 24,

1982, the assigned ALJ issued an Initial Decision with respect to the issues before her. In that initial decision, the ALJ addressed certain issues which the Public Advocate had attempted to introduce into the proceeding. One issue related to a proposed interest charge on over-recoveries under the LEAC, the other related to the Advocate's recommendation that the Board adopt a policy encouraging conversion of electrically heated homes within JCP&L's service territory to gas or oil heat. With regard to these two issues the ALJ stated:

> Procedural fairness dictates that Rate Counsel's recommendations be rejected out-of-hand in this proceeding. A prehearing conference was held on February 2, 1982. I issued a prehearing order on February 16, 1982, which order included stipulations and a preliminary definition of issues. The order did not include within the statement of issues questions relating to the reasonableness of petitioner's current credit on over-recoveries nor policies concerning electricially heated homes. At no time subsequent to issuance of the prehearing order did Rate Counsel give notice of these issues. Rate Counsel did not raise any questions regarding electrically heated homes and interest on over-recoveries until it filed its initial brief.

In view of the fact that the parties had not been afforded the opportunity to address the issues belatedly raised by the Advocate, the Administrative Law judge rejected the Advocate's recommendations. The ALJ further noted that, by their very nature, such proposals would more appropriately be addressed in a generic proceeding rather than JCP&L's LEAC hearing, since they would affect not only JCP&L, but conceivably all electric utilities. Similarly, issues belatedly raised by Ocean County in the LEAC proceeding dealing with outages at JCP&L's Oyster Creek nuclear plant were rejected by the ALJ as being more appropriate to a base rate case than a LEAC proceeding.

After receipt of the ALJ's Initial Decision, it was determined by the Board that more current data was necessary prior to reaching a final LEAC revenue figure. For that reason, the Board, on July 1, 1982, sent the case back to the OAL for the

limited purpose of updating relevant data. In its letter of transmittal, the Board specifically excluded from consideration in the reopened proceeding those issues already rejected by the ALJ as inappropriate to a LEAC proceeding and continued its reservation of TMI-fault.

After completion of the data update the Board, on September 2, 1982, issued its LEAC determination. In that order, the Board addressed the Advocate's "exceptions" to the Board's reservation of issues in its July 2, 1982 letter sending the case back to the OAL. The Board stated:

> As to the Advocate's . . . exception regarding the issues reserved by the Board in its letter of transmittal of July 1, 1982 to the Office of Administrative Law, we have reviewed the Advocate's positions and find that in the main, they relate to issues which are not the subject of a LEAC review, but which are subject to either a generic review or a review within the context of a base rate case. The Board's sole rationale for reserving these issues was to insure that the parties, most especially *[sic]* the Public Advocate, did not embark on a time consuming investigation of unrelated issues.

Appeals from the Board's July 22, 1982 base rate order were filed by the Public Advocate, Ocean County and ratepayer Diane Fahey. Jersey Central filed a cross-appeal.

Appeals from the Board's September 2, 1982 LEAC order were filed by the Public Advocate and Ocean County.

Finally, we were informed at oral argument that a new rate increase application has been filed by JCP&L and is presently pending before the Board.

We affirm the four orders here under review generally for the reasons expressed by the Board of Public Utility Commissioners, with the following observations.

At the outset we recognize the difficulty of the task given to the Board in the regulation of this utility. Jersey Central Power and Light has been virtually devastated by the events at Three Mile Island. Since the date of that accident, the Board has had to

entertain numerous applications from JCP&L for relief in various forms including rate and LEAC applications such as here under review. As the Board stated in its April 23, 1981 order:

> Unquestionably this Board and its Staff have been required to devote more time, effort and resources to the problems occasioned by Three Mile Island than has ever been true during the approximately 70 years since the agency was created. It is not an exaggeration to say that we probably have a more intimate knowledge of the regulatory and financial problems associated with this utility than in any other matters subjected to our jurisdiction. This has not been a matter of choice. It has been a matter of sheer necessity.

It has been this type of intensive regulatory monitoring of JCP&L that has gained the Board's primary goal: the maintenance of safe, adequate and proper service for the public. To date, JCP&L's ratepayers have experienced no major disruptions in essential utility services.

Throughout all of the post Three Mile Island proceedings brought by JCP&L, the Advocate has strongly and relentlessly sought to have a fault determination made by the Board. The Advocate's position, briefly stated, has been that JCP&L's rates, in order to be deemed reasonable, must reflect the degree of TMI culpability, if any, attributable to the Company. While the Advocate's position may have a prima facie appeal, especially to ratepayers facing yet another increase in utility bills, the fact remains as the Board points out, that the Advocate's seemingly pro-ratepayer argument fails to give proper emphasis to the Board's primary ratepayer responsibility. That responsibility is to insure continued utility service for the more than two million residents of the territory serviced by JCP&L. In the absence of a currently available alternative to JCP&L's continued existence, the Company must be kept financially able to continue providing such service. As the Board has pointed out:

> This utility system has not paid a dividend in two years. It is not, and cannot access [*sic*] financial markets to cover capital costs. It is paying expenses from a revolving line

> of short-term bank credit. This sole source of capital is based upon the bank's continuing evaluation of the utility's system revenue flow which the movant seeks to restrict. If we were to stay even consideration of an appropriate level of purchase power costs and base rates in matters currently pending, this could easily be interpreted by the banks as an "adverse change" permitting the banks to restrict their line of credit. Such a consequence would go to the very heart of the financial viability of this utility and its ability to serve its customers.

It must be apparent that a fault inquiry would have placed the Board, the utility and the ratepayer in a "catch 22" situation.

It is apparent that, contrary to the assertions of the Advocate, the Board has not been unmindful of the rate consequences to ratepayers flowing from the Three Mile Island accident and has exerted every effort to protect the ratepayers from undue charges. As the Board states, "For the Advocate and other cross-appellants to now argue that, absent a TMI-fault investigation, ratepayers are being exposed to unreasonable rates is both irresponsible and untrue." Any analysis of whether the Board acted properly in declining to embark upon the proposed fault investigation must begin with a clear understanding of the scope of the Board's discretion in this area. It is certainly true, as the Advocate and other cross-appellants argue, that the Board has the authority to disallow expenses that it finds to be the result of a utility's negligence, imprudence or mismanagement. It does not necessarily follow, however, that the Board must embark on every proposed investigation into alleged utility negligence, imprudence or mismanagement, no matter how futile or detrimental to the public interest such an investigation may be. Nor does it follow that the Board may not, under any circumstances, defer in the exercise of its authority to those other agencies possessing either primary or exclusive jurisdiction over the matters involved.

The Public Advocate has attempted to introduce into the ongoing Three Mile Island fault debate a new "procedural" argument based upon his interpretation of the "single controversy" doctrine. This argument, raised for the first time in his brief challenging the

Board's July 1982 and September 1982 rate orders, appears to be twofold. First, the Advocate argues that the Board has violated the single controversy doctrine by "ignoring" the Three Mile Island fault issue in connection with the setting of JCP&L rates. Inasmuch as an assessment of Three Mile Island's culpability is viewed by the Advocate as a prerequisite to the setting of reasonable rates, nothing short of an actual allocation of fault will indicate that "all" the issues in the case have been resolved.

The Advocate also argues that the "single controversy" doctrine vests in the Office of Administrative Law the independent adjudicatory authority to embark upon an investigation into the causes of the Three Mile Island accident in connection with any Three Mile Island related rate application transmitted to it by the Board. The Advocate regards this authority so paramount that the Board itself may not reserve the Three Mile Island fault issue and thus frustrate the Office of Administrative Law in the exercise of its adjudicatory responsibility to hear it. We disagree.

The simple answer to all of these arguments is that the authority to determine that fault is relevant to any rate proceeding is vested in the Board. In recalling that issue from the Administrative Law judge the Board, in light of its knowledge of the precarious existence of JCP&L and its efforts to balance the needs of the utility and the interests of the ratepayers, simply determined that fault was not relevant to this case before it. As we understand the law as it existed at the time the Board made this decision, the Board acted correctly.

During the pendency of these appeals, the Legislature enacted and the Governor signed *L.*1982, *c.*94 dealing with the determination of fault after a power generating accident. That statute which ostensibly seeks to change the power of the Board which we have just mentioned is clearly not applicable here and we see no reason therefore to apply it. There is currently a rate proceeding now before the Board in which JCP&L is the applicant. That proceeding will call *L.*1982, *c.*94 into consideration.

The issue of fault has also been raised in connection with the LEAC increases. In the proceeding which resulted in the last of

the five LEAC increases before the base rate order of July 31, 1981, the Advocate made a motion requesting that no increase in the LEAC be granted until the Board decided the issue of fault. The Adminstrative Law judge in the course of his initial decision, granted an increase acknowledging "that increases pursuant to an adjustment clause must at some point be determined to be just and reasonable in order to be allowed on a permanent basis" and "that an issue which is fundamental to the determination of reasonableness, *i.e.*, the issue of fault, is not being considered in this proceeding." The ALJ denied the Advocate's motion because, the Advocate claims, it was clearly based on the assumption that the increase in the LEAC was interim in nature and that the Board would decide the issue of fault in the base rate case. The Board's failure to decide that issue, it is argued, violates the holding of the Supreme Court in *In re Board's Investigation of the Tele. Cos.*, 66 *N.J.* 476, 492 (1975).

The Advocate also argues that the Board apparently believes that it is enough for it to determine that JCP&L actually spent additional money on replacement power or to determine that JCP&L could not have purchased that power more cheaply elsewhere. The Advocate argues that that is not enough. He claims that the Board must determine the reasonableness of the utility's actions at Three Mile Island, and whether the utility's negligence *caused* the increased replacement power costs or at least contributed to their magnitude. Citing *Public Service Coordinated Transport* v. *State*, 5 *N.J.* 196 (1950), he claims that the Court held that the Board and reviewing courts cannot "accept the books of account of a public utility at face value in a rate case in which reasonableness is always the primary issue." *Id.* at 218.

The Advocate apparently argues that not only was the passthrough of Three Mile Island replacement energy costs improper for failure on the part of the Board to examine the fault issue, but also because of an alleged failure by the Board to "validate" prior pass-throughs of Three Mile Island replacement energy costs in its final July 1981 base rate order. If the Advocate is contending that every final base rate order must contain specific reference to

prior LEAC proceedings, we regard such as frivolous. For example, *In re Revision of Rates by Redi-Flo Corporation*, 76 *N.J.* 21 (1978), requires only that there be a nexus between a LEAC proceeding and a base rate case in which a utility's overall financial status is evaluated. The Board's July 1981 base rate order approved rates based upon JCP&L's cost items, one of which was the fuel expense examined in the prior LEAC. By its acceptance of such base rates, therefore, the prior LEAC was authorized "in the context of a pending rate proceeding," as required by *Redi-Flo*. 76 *N.J.* at 41, n.13. Thus the requisite nexus between a LEAC proceeding and a base rate case in which a company's complete finances are examined existed here. We find that no more explicit validation is required.

In her main and reply briefs, Diane Fahey contends that the assessment of decontamination costs of Three Mile Island 2 to the ratepayers is beyond the authority granted to the Board by the Legislature. We disagree.

Ratemaking is a legislative, not a judicial function, and the Legislature has delegated its ratemaking authority to the Board of Public Utilities. *Public Service Coordinated Transport* v. *State*, 5 *N.J.* at 214. The Board is vested with broad discretion limited by the statutory standard prescribing the ratemaking powers of the Board: it must fix just and reasonable rates. *Id.* at 214-215; *N.J.S.A.* 48:2-21(b)(1). It is fundamental that a court which reviews a decision of the Board has to weigh for itself whether the rate is just and reasonable. A legislative body, such as the Board, prescribing a rule for future conduct is not the same as a judicial or quasi-judicial tribunal. Thus, if there is any presumption in favor of the order of the commissioners it depends upon the strength of the reasoning by which it is supported. *Public Service Co.* v. *Public Utility Bd.*, 84 *N.J.L.* 463-467 (Sup. Ct. 1913), rev'd in part 37 *N.J.L.* 581 (E. & A. 1914), aff'd on rehearing 87 *N.J.L.* 597 (E. & A. 1915), app. dism. 242 *U.S.* 666 (1917).

The justness and reasonableness of a rate "can only be determined after an examination of a company's property valuation

which constitutes its rate base; its expenses, including income taxes and an allowance for depreciation; and the rate of return developed by relating its income to the rate base." 5 *N.J.* at 216. Here it is contended that clean up costs constitute the Company's expenses and that because Three Mile Island 2 is not in the rate base, expenses related to it cannot be taken into account in setting a rate.

We know of no authority for that assertion nor is any cited to us. The "used and useful" test prevents inclusion in rate base of any facility which is not contributing to the production of energy. That, however, says nothing at all about anything other than a rate base decision. Specficially, it does not say whether expenses of property which is not used and useful can be passed along in some other manner. It does not say that expenses which are incurred in order to have property restored to the used and useful status cannot be passed along to the ratepayer.

In fact, as the Board's brief points out, there are expenses which are not directly linked to base rate items that are routinely passed on. The best example is expenses of amortization of a utility's investments in projects abandoned before they can be included in the rate base. Obviously such projects are not used and useful but the ratepayer is sometimes required to pay a share of the costs.

Reliance is placed on the case of Office of *Consumers Counsel* v. *PUC*, 67 *Ohio Stat.*2d 153, 423 *N.E.*2d 820 (Sup. Ct. 1981), app. dism. 455 *U.S.* 914, 71 *L.Ed.*2d 455 (1982), aff'd 1 *Ohio St.*3d 22 (Sup. Ct. 1982). That case involved nuclear power plants which, like Forked River, had been abandoned before they were completed. The Public Utility Commission permitted amortization of investment in the four cancelled plants. It believed that "if the expenditures are prudent, amortization should be permitted." It decided that they had been prudent because at the time the decision was made to construct the plants, it was a reasonable decision. Similarly, the decision to terminate construction was reasonable. 423 *N.E.*2d at 825-826.

The Ohio Supreme Court decided that the decision based on prudence applied by the commission was not the correct test. Instead the Ohio statute required that when the Public Utility Commission fixed just and reasonable rates, it had first to determine " 'the cost to the utility of rendering the public utility service for the test period. . . .' " 423 *N.E.*2d at 826. The cancelled planned expenditures, the court said, did not represent the cost to the utility of rendering public utility service for the test period. The cost also did not come within another provision of the statute allowing adjustment for certain other factors. *Id.*, 827-828.

Thus the Ohio court was not simply deciding whether it believed the record showed that the approved rates were just and reasonable. It was restricted instead by a statutory definition of what was just and reasonable and found that allowance of amortization costs did not fit within that definition. Moreover, it dealt with amortization costs not with clean up costs as we do here.

Our Board of Public Utility Commissioners has broad power to set rates. Obviously someone has to pay for the clean up costs. The Board's decision estimated that it would cost each ratepayer approximately fifty cents per month for his share of these costs. The Board also believed that it was important that New Jersey's ratepayers share in the clean up costs so as not to jeopardize plans for federal money to clean up Three Mile Island 2. The sooner the plant gets back on line the sooner it can produce energy which will be to the benefit of the ratepayers.

It is apparent that the Board took into account the numerous factors involved in allocating clean up costs. It concluded by putting a relatively minimal cost on the ratepayers in order to insure receipt of clean up funds from other sources and introduce some measure of stability into the utility's financial situation. All these considerations, we believe, were reasonable and the result, we think, is that that inclusion of clean up costs in the adjusted rate cannot be found so unjust or unreasonable as to require reversal. We find that the allowance of clean up costs are within the power delegated to the Board of Public Utilities by the Legislature.

In its appeal in the 1981 base rate case JCP&L argues that the rates set by the Board are not just and reasonable because: (1) when the Board removed TMI-1 from the rate base it failed to recognize the interdependence between the rate base and the rate of return; if TMI-1 was not going to be in the rate base, a higher rate of return should have been permitted; (2) the record does not support a finding that 10.68% is an adequate overall rate of return and that 16.5% is an adequate return on equity; (3) the Board failed to refer to the standards established in *Federal Power Commission* v. *Hope Nat. Gas Co.*, 320 *U.S.* 591 (1944), and therefore had no way of determining whether it was setting just and reasonable rates. We find that none of these factors show that the rate was unjust or unreasonable.

The Board is not required to use any particular formula in setting just and reasonable rates and because it must consider the public interest as well as the investors' interest, the failure to allow a higher rate of return because of the removal from the rate base of TMI-1 was not error. Certainly the Board did not ignore the interrelationship between the rate base and rate of return. In the rate of return portion of the opinion, the Board recognized that "[c]apital and credit markets reflect the consensus judgment of investors who direct resources to their highest marginal returns. Capital flow in response to risk/reward relationships and failure to compete effectively for funds leads invariably to capital shortages." The Board also said that its ultimate goal was to insure safe, adequate and proper service for the utility customers. It recognized that the Company contended that it needed additional revenues, "including cost and carrying charges that have been disallowed but are still an obligation of the Company." This would include the previous elimination from the rate base of TMI-1 and the removal of AFUDC accruals on Forked River subsequent to April 4, 1979, ordered by the Board. These actions are consistent with past Board policy. Hence, the Board recognized its obligation to investor and consumer interests and understood that the Company wanted the Board in considering

the rate of return, to take into account that TMI-1 had been removed from the rate base.

While it is true that the Board's decision does not closely analyze the relationship between rate of return and the removal of TMI-1 from the rate base, it is also apparent that the Board considered that relationship and apparently decided that the removal of the unit from the rate base did not justify a higher rate of return.

Once TMI-1 was taken out of the rate base, it would not have made sense to raise the rate of return because the utility was not entitled to a rate of return on property which was not part of the base. If the rate on the remaining property could be increased to make up for the loss of TMI-1, the effect would be the same as leaving TMI-1 in the rate base. Such would create a rate based upon property not part of the rate base and could produce an unreasonable rate of return. Accordingly, we conclude that the failure to increase the rate of return merely because TMI-1 was taken out of the rate base did not render the rate of return unjust or unreasonable.

Finally, as to this point, the failure of the Board to refer to the *Hope* standards does not indicate that the decision of the Board violated the Public Utility law. If we can find, as we do, that the rates are just and reasonable and adequately balance consumer and investor interests, the mere failure to refer to *Hope* or specifically to set out the three *Hope* standards as referred to by JCP&L does not render the ultimate decision unjust or unreasonable.

With respect to its appeal and cross-appeal on the 1981 and 1982 base rate orders, JCP&L argues that the Board failed to establish rates which comported with the requirements of the federal and state Constitutions under the standards set forth in *Federal Power Commission* v. *Hope Nat. Gas Co.*, 320 *U.S.* 591 (1944). *Hope* basically held that an investor had three interests: that the company have sufficient revenue for operating and capital costs, that the return on equity be commensurate with returns on similar enterprises, and that the company be able to maintain credit and attract capital.

We note at the outset that the three factors which JCP&L cites are not identical to those which we have just mentioned. JCP&L contends that the Board should have made a finding on what its real earnings would have been as a result of the Board's order. We do not read *Hope* to require that. *Hope* does say that the investor does have the right to be concerned with the financial integrity of the company. It does not say, however, that specific findings must be made on the impact of the order on the company's financial integrity.

Any federal constitutional argument must be based on the principle set forth in *Permian Basin Area Rate Cases*, 390 *U.S.* 747, 20 *L.Ed.*2d 312 (1968), reh. den. 392 *U.S.* 917 (1968):

> It is, however, plain that the "power to regulate is not a power to destroy," [citations omitted]; and that maximum rates must be calculated for a regulated class in conformity with the pertinent constitutional limitations. Price control is "unconstitutional . . . if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. . . ." Nebbia v. New York, 291 U.S. 502, 539, 78 L.Ed. 940, 958, 54 S.Ct. 505, 89 A.L.R. 1469. [*Id.* at 769-770]

As the *Permian Basin* case noted, "the just and reasonable standard of the Natural Gas Act 'coincides' with the applicable constitutional standards . . . and any rate selected by the Commission from the broad zone of reasonableness permitted by the Act cannot properly be attacked as confiscatory." 390 *U.S.* at 770.

Federal Power Com. v. *Nat. Gas Pipeline Co.*, 315 *U.S.* 575, 586 (1942), held that a commission was not bound to use any single formula in determining rates. The question for the courts is whether the order, viewed in its entirety, meets the requirements of the act that the rates be just and reasonable; the method employed is not controlling.

Hope held that the only question is whether the rates were just and reasonable, and that "involves a balance of the investor and the consumer interests." 320 *U.S.* at 603. Discussing investor

interests, the Court said there must be enough revenue for operating expenses and capital costs of the business. The return to the equity owner must be commensurate with returns on investments in other enterprises having corresponding risks. The return must be sufficient to assure confidence in the financial integrity of the enterprise so that it can maintain credit and attract capital. 320 *U.S.* at 603.

We have carefully examined all of the briefs filed by JCP&L, and when we read them together, we believe that the utility's only constitutional argument is that the Constitution was violated because the Board failed to make specific findings pursuant to *Hope's* requirements.

We do not find any constitutional infirmity in the orders of the Board. It appears to us that JCP&L is seeking to ignore the difficult task which the Board has taken on in an attempt to keep that organization vital and still servicing the ratepayers. We believe that if it were not for the activities of this Board, JCP&L and its investors might well be nothing more than history. It does not serve the public well for the utility to take the attitude that it is entitled to everything when in fact it has gotten itself into a position where it must rely on the public to save it.

If we presume that JCP&L could argue that various portions of the order violated the federal Constitution, we find that no such violation occurred. In reaching this conclusion we have considered whether *Hope* sets constitutional requirements for a state court. We think it does but we believe that the three investor-interest criteria cited by JCP&L are not of constitutional dimension, and are not the only criteria which a court must consider in deciding whether a rate set by a utility commission is so high that it exploits consumers or so low that it is confiscatory. It is apparent that the *Permian Basin Area Rate Cases* cited above, 390 *U.S.* at 790-792, shows that those *Hope* standards are not exclusive. Never the less, insofar as the three investor-interest criteria do apply, we find that they were not violated by the substance of the 1981 order.

The *Permian Basin Area Rate Cases* involved the setting of maximum rates in interstate commerce for the sale of natural gas. The case reviewed an order of the Federal Power Commission which had permitted one maximum price for natural gas produced after January 1, 1961 and a lower price for all other natural gas produced in the Permian Basin. The Court first held that it had no power to set aside a reasonable rate. 390 *U.S.* at 767. There were, however, some constitutional limitations. The Court said that the commission had the power to set maximum prices and to set different rates for different classes. Nevertheless, the rates had to be calculated so that they would not be arbitrary, discriminatory or demonstrably irrelevant to the legislative policy. 390 *U.S.* at 769-770. The Court said that "the just and reasonable standard of the Natural Gas Act 'coincides' with the applicable constitutional standards." *Id.* at 770.

We think it to be significant that the *Permian Basin* decision is divided into several portions. The portion which discusses the constitutional requirements (which would therefore be applicable to a state court's interpretation of a state statute) does not say that the three specific *Hope* standards to which Jersey Central refers in this case (the investor-interest standards) are of constitutional dimension. It does say that the more general requirements of *Hope* are constitutionally required.

First, the Court, in discussing the propriety of maximum rates, said:

> Accordingly, there can be no constitutional objection if the Commission, in its calculation of rates, takes fully into account the various interests which Congress has required it to reconcile. We do not suggest that maximum rates computed for a group or geographical area can never be confiscatory; we hold only that any such rates, determined in conformity with the Natural Gas Act, and intended to "balanc[e] . . . the investor and the consumer interests," are constitutionally permissible. FPC v. Hope Natural Gas Co., supra, at 603, 88 L.Ed. at 345. [390 *U.S.* at 770]

So far the Court had not said that the three specific ways of measuring investor interest must always be examined in a rate proceeding. Rather, a general balancing might well be sufficient to satisfy the Constitution.

It was only after the Court had decided many aspects of whether the commission had violated pertinent constitutional limitations and whether it had abused its statutory authority, that it turned to deciding whether the rate structure the commission had devised should be upheld. The Court then asked what criteria should be used to assess the commission's rate structure. Here it referred to *Hope* again, saying that the *Hope* court had "found appropriate criteria by inquiring whether 'the return to the equity owner [is] commensurate with returns on investments in other enterprises having corresponding risks,' and whether the return was 'sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and attract capital.' *Id.*, at 603, 88 *L.Ed.* at 345." *Permian Basin Area Rate Cases*, 390 *U.S.* at 790-791. The Court then made the following statement which we find significant: "These criteria, suitably modified to reflect the special circumstances of area regulation, remain pertinent, but they scarcely exhaust the relevant considerations." *Id.* at 791.

Thus, the *Permian Basin* case not only stands for the proposition that the questions of return on investments, assurance of confidence and financial integrity, and the ability to maintain credit and attract capital, are not criteria of constitutional dimension, it also makes clear that those criteria are not exclusive. Specifically:

> The Commission cannot confine its inquiries either to the computation of costs of service or to conjectures about the prospective responses of the capital market; it is instead obliged at each step of its regulatory process to assess the requirements of the broad public interests entrusted to its protection by Congress. Accordingly, the "end result" of the Commission's orders must be measured as much by the success with which they protect those interest as by the effectiveness with which they "maintain

credit . . . and . . . attract capital." [390 *U.S.* at 791; footnote omitted]

The Court then looked into three areas, only one of which had to do with the rights of investors. First, it asked whether the commission had abused its authority. Second, it had to decide whether the order was supported by substantial evidence. Third, it had to decide whether the order could reasonably be expected to maintain the financial integrity of the utility, attract capital and compensate investors, "and yet provide appropriate protection for the relevant public interest, both existing and foreseeable." 390 *U.S.* at 791-792. Hence, the *Hope* criteria to which JCP&L refers in this appeal were considered only in tandem with the public's interest. They would not be sufficient criteria on their own. Consequently, we hold (1) the *Hope* criteria regarding financial integrity, attraction of capital and compensation for investors are not of constitutional dimension; (2) the *Hope* criteria requiring just and reasonable rates and the balancing of investor and consumer interests are of constitutional dimension; (3) even when the specific criteria are used they are not exclusive; rather they should be used together with consideration of the public's interest.

We find that none of the purported errors in the decision which JCP&L apparently asserts in its second reply brief violate those portions of the *Hope* decision which bind us. None of those factors render the rate unjust or unreasonable and none of them show that the commission has failed to balance the interest of the investor and the consumer.

We find no merit to JCP&L's argument that the 1981 and 1982 base rate orders violated *N.J. Const.* (1947), Art. I, ¶ 20, which provides that private property may not be taken for public use without just compensation. In view of what we have stated heretofore in this opinion, we will not give the argument dignity by more than referring to it.

Finally, JCP&L claims that the Board erred in refusing to allow ratepayers to pay carrying charges during the amortization period allowed for its abandoned Forked River plant. The Board

first found that Forked River had been abandoned on April 4, 1979 and it refused to allow AFUDC treatment after that date. Secondly, although the decision is not entirely clear, the Board apparently refused to allow base rate treatment for Forked River; the parties agree that that occurred and JCP&L does not claim that that was error. Third, it adopted its Staff's recommendation of a 15-year amortization period.

JCP&L argues that it began to build the Forked River plant in response to a general policy established by the Board to increase generating capacity. It notes that throughout the construction period the Board approved and encouraged construction. In this rate application, JCP&L wanted to recover over 20 years the $395 million net investment it had made in the abandoned project. Alternatively, it suggested a 15-year amortization period assuming a lower overall cost of capital during that time. Under the first plan, the Board would have to allow an increase in annual revenues of $61.5 million and under the second plan, it would have to allow increased revenues of $52.2 million.

When the Board excluded carrying charges after April 4, 1979, JCP&L claims that that reduced the annual income by $26.9 million. By refusing to allow carrying charges during the period of amortization, the Board required JCP&L shareholders to pay the carrying charges for 15 years out of the rate of return allowed on property in the rate base. We understand JCP&L's argument as not actually contesting the refusal to put Forked River in the rate base, or the 15-year amortization period, but as contending that carrying charges should be allowed during the 15-year period.

JCP&L says that investors should not have to bear any part of the cost of the abandoned project; the consumers should take the risk of a project which would have benefited them.

The choice of how to treat these carrying costs was a decision to be made by the administrative agency, not by a reviewing court. The decision to disallow carrying costs is part of the overall scheme imposed by the Board and should not be disturbed. In

any event, we do not regard the decision as unfair. The ratepayers have already paid over $53 million in constructing the project in the form of Construction Work in Progress included in rate bases. Ratepayers will never benefit from the abandoned project. The project is one which investors hoped would provide a profit for them. If that hope is not realized because the investment does not pay off, the investors, not the ratepayers, should be asked to bear the risk.

The orders under appeal are affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

ELIZABETH MCLAUGHLIN
Clerk

Appendix B-2

CIVIL ACTION

NOTICE OF APPEAL

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket Nos.
A-162-81T2
A-218-82T1
A-220-82T1
A-227-82T1
A-219-82T1
A-224-82T1

(Consolidated)

IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND LIGHT COMPANY FOR AN INCREASE IN RATES AND CHANGES IN THE TARIFFS FOR SUCH SERVICE (BPU DOCKET NO. 804-285)

IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND LIGHT COMPANY FOR APPROVAL OF AN AMENDMENT OF ITS TARIFF TO PROVIDE FOR AN INCREASE IN RATES AND CHARGES FOR ELECTRIC SERVICE AND A REVISION IN DEPRECIATION RATES (BPU DOCKET NOS. 818-726, 818-736)

IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND LIGHT COMPANY LEVELIZED ENERGY ADJUSTMENT (BPU DOCKET NOS. 821-75, 818-726)

TO: Stephen W. Townsend, Clerk
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Elizabeth McLaughlin, Clerk
Superior Court of New Jersey
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NOTICE is hereby given that, pursuant to *N.J. Const.* (1947), Art. VI, § V, ¶1 and *R.* 2:2-1(a), appellant Jersey Central Power & Light Company ("Jersey Central") appeals to the Supreme Court of New Jersey as of right with respect to substantial questions arising under the United States Constitution and the Constitution of the State of New Jersey determined by the Appellate Division of the Superior Court by judgment entered on July 28, 1983 in favor of respondent New Jersey Board of Public Utilities. The appeal is from the holding of the Appellate Division that the specific standards set forth in *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591, 603, 610, 88 L.Ed 333, 345, 349 (1944) for determining whether the rates allowed a utility are "just and reasonable", and therefore are sufficient to avoid the constitutional prohibition of taking private property for public use without just compensation, do not rise to constitutional dimension. Jersey Central contends the *Hope Standards* are of constitutional dimension and that the decision of the Appellate Division departs from well settled federal law and contravenes the Fifth Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, and *N.J. Const.* (1947) Art. I, ¶20.

This matter is entitled to a hearing preference pursuant to *R.* 1:2-5(1) since a state agency is a party.

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OF COUNSEL

Dated: August 17, 1983

CIVIL ACTION

NOTICE OF PETITION
FOR CERTIFICATION

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SUPERIOR COURT OF NEW JERSEY
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DOCKET NOS.
A-162-81T2
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IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND LIGHT COMPANY FOR AN INCREASE IN RATES AND CHANGES IN THE TARIFFS FOR SUCH SERVICE (BPU DOCKET NO. 804-285)

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NOTICE is hereby given that pursuant to *R.* 2:2-1(b) and *R.* 2:12 appellant Jersey Central will petition the Supreme Court of New Jersey for certification to the Appellate Division to review the final judgment of that Court entered on July 28, 1983 in favor of respondent New Jersey Board of Public Utilities.

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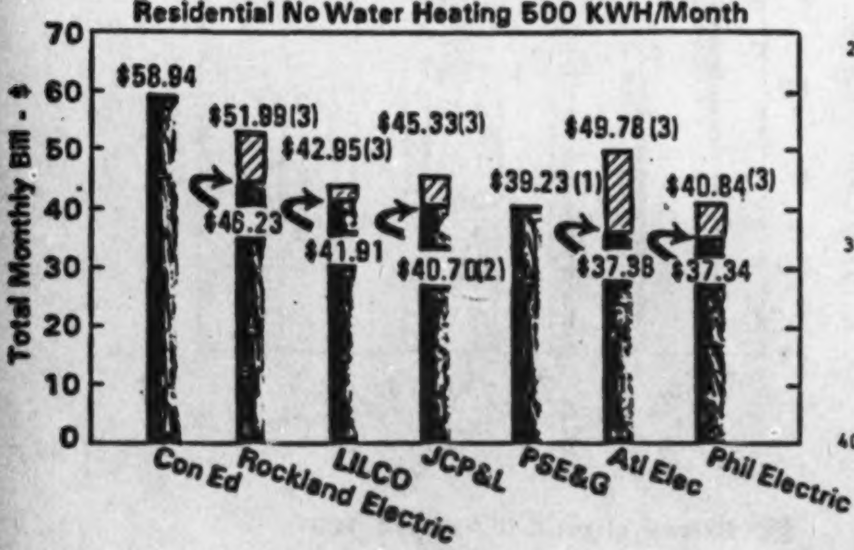
Dated: August 17, 1983

* This bar graph comparing rates in effect for the listed electric utilities was annexed to Jersey Central's April 29, 1980 petition for a rate increase and was reproduced by Jersey Central in the appendices filed in its appeal in Docket No. A-162-81T2.

Jersey Central Power & Light Company
Typical Bill Comparisons
Jersey Central and Neighboring Utilities



Rates in Effect April 1980

(1) Reflecting rate increase granted 4/14/80.

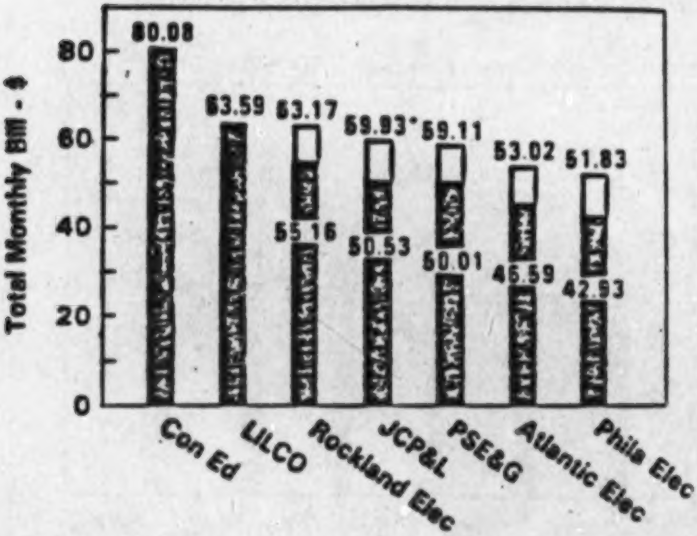
(2) Reflecting rate increase granted 4/10/80.

(3) If pending base rate increase is granted in full.

* The following graphs and schedules were annexed to Jersey Central's petition for a rate increase filed on August 11, 1981 and were reproduced in the appendices filed by Jersey Central in its appeal in Docket No. A-218-82T1.

Typical Bill Comparisons
Jersey Central and Neighboring Utilities

Residential No Water Heating 500 KWH/Month



■ Rates in effect as of August 1, 1981

□ If pending rate increase were granted in full

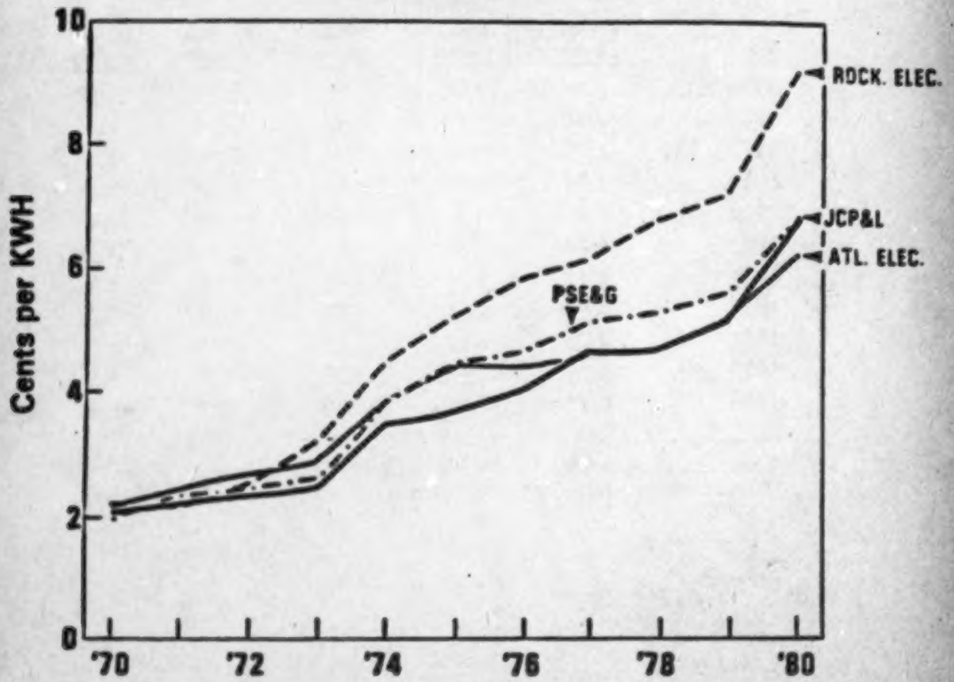
¢/Kwh:

■	16.0	12.7	11.0	10.1	10.0	9.3	8.6
□	-	-	12.6	12.0	11.8	10.6	10.4

* Stages 1 and 2, plus estimated March 1982 LEAC (reflecting 12 months of TMI-1 generation) and expiration of deferred energy cost surcharge

8/7/81

New Jersey Utilities
Average Rate per KWH of Electric Sales
1970-1980



Source: FERC Statistics of Privately Owned Electric Utilities in the United States

NEW JERSEY UTILITIES
Average Rate per Kwh of Electric Sales*
1970-1980

(¢/Kwh)

Year	Atlantic Electric	Jersey Central	Public Service	Rockland Electric	Average
1970	2.19	2.04	1.95	2.22	2.00
1971	2.44	2.17	2.34	2.19	2.31
1972	2.73	2.33	2.46	2.56	2.46
1973	2.90	2.45	2.65	3.30	2.64
1974	3.93	3.46	3.91	4.55	3.81
1975	4.44	3.66	4.47	5.27	4.28
1976	4.44	4.05	4.69	5.87	4.52
1977	4.61	4.68	5.16	6.24	5.00
1978	4.74	4.72	5.33	6.85	5.13
1979	5.24	5.15	5.70	7.32	5.54
1980	6.27	6.79	6.90	9.27	6.84

* Sales to all customers, including sales for resale (Source: FERC Statistics of Privately Owned Electric Utilities in the United States).

Appendix C-1

INTERIM ORDER

STATE OF NEW JERSEY
DEPARTMENT OF ENERGY
BOARD OF PUBLIC UTILITIES
1100 Raymond Blvd.
Newark, New Jersey 07102

BPU DOCKET NO. 804-285
BPU DOCKET NO. 803-172
THIRD AMENDMENT TO PETITION
BPU DOCKET NO. 795-508A

IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND LIGHT COMPANY FOR APPROVAL OF AN INCREASE IN RATES AND CHARGES FOR ELECTRIC SERVICE.

IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND LIGHT COMPANY FOR APPROVAL OF THE TRANSFER OF ITS INTEREST IN CERTAIN PROPERTY ACQUIRED IN CONNECTION WITH THE CONSTRUCTION OF UNIT NO. 7 OF THE SEWARD GENERATING STATION.

IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND LIGHT COMPANY: PETITION FOR AUTHORITY TO ISSUE, SELL AND REVIEW UP TO $189,000,000 OF PROMISSORY NOTES TO BE OUTSTANDING FOR MORE THAN ONE YEAR: TO DELIVER A SUPPLEMENTAL INDENTURE DATED AS OF JUNE 15, 1979; TO ISSUE THEREUNDER AND SELL OR PLEDGE UP TO $100,000,000 AGGREGATE PRINCIPAL AMOUNT OF THE FIRST MORTGAGE BONDS DUE ON OR BEFORE JULY 1, 1986.

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BY THE BOARD
DOCKET NO. 804-285

This Order addresses the Motion of Jersey Central Power & Light Company, filed April 29, 1980 for interim or emergent rate relief in the amount of $60 million dollars annually, pursuant to *N.J.S.A.* 48:2-21.1. Petitioner also has pending its main rate application to increase rates in the amount of $173.5 million dollars, which amount includes the interim request pursuant to *N.J.S.A.* 48:2-21. The main rate request proposed to be effective June 1, 1980 is hereby suspended pending further hearings and full investigation.

After required notice, because of the emergent nature of the Petitioner's request, the Board held immediate hearings which commenced on Monday, May 5, 1980, and continued on May 7, 9 and 12, 1980. In addition thereto the Board held public hearings to permit members of the public in the Petitioner's service territory to be heard. Four such public hearings were held in Hackettstown, Morristown, Freehold and Toms River on the evenings of May 6, 7 and 8, 1980.

At the evidentiary hearings, there was submitted by JCP&L the testimony of Dennis Baldassari, Treasurer of JCP&L, Fred D. Hafer, Vice-President-Rate Case Management of GPU Service Corporation ("GPUSC"). Paul H. Preis, Controller of JCP&L, Eugene F. Carter, Assistant Vice-President-Rates, GPUSC, and numerous exhibits. There was also submitted by the Board's staff the testimony of Anthony J. Zarillo, Executive Officer of the Board, and Dr. Fred Grygiel, Chief Economist of the Board. In addition, Mr. Edward Perrault presented a statement of objection in respect to the rate design issue on behalf of Air Products Company.

Active participants in the current proceedings included the Board's Staff, the Department of the Public Advocate, Division of Rate Counsel, the New Jersey Department of Energy, the County of Ocean, the U.S. Army, Office of Regulatory Law, on behalf of

the U.S. Government executive agencies, the American Association of Water Companies, (New Jersey Chapter) and Air Products Company. There was extensive cross-examination of substantially all the witnesses presented.

The Board is properly authorized pursuant to *N.J.S.A.* 48:2-21, 48:2-21.1, to grant interim emergent relief after notice and hearing. *In Re Revision of the Rates by Redi-Flo Corporation*, 76 N.J. 21 (1978), *In Re Board's Investigation by Telephone Companies*, 66 N.J. 476 (1975).

Indeed, since *Hope*[1] and pursuant to the legal standards we have enunciated,[2] this Board is duty bound to provide necessary funds to a utility on an emergent basis, subject to refund in the event of a financial and service crises. We have defined emergency in rather stringent terms to protect the consumer. There has to be a showing that but for an immediate infusion of rate payer funds Petitioner would not be able to continue to provide safe adequate and proper service or reasonably access the market for needed construction or expense. This may take the form of a coverage crisis, an inability to access the financial markets for needed construction and/or or a cash-flow crisis. Mere attrition in earnings is not sufficient unless it impacts financing, construction, or service. It is our inescapable conclusion, after review of this record, that JCP&L is in an emergent financial crisis impacting its ability to serve customers this day and in the months to come and that a rate increase of $60 million in base rates is absolutely necessary for continued service. Without such relief Petitioner and its customers will surely suffer irreparable harm unprecedented in electric utility regulatory experience.

With respect to the current motion for interim relief, the Board has given substantial weight to Staff's testimony on the financial condition of the Company.

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1. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.ed, 333 (1944).

2. In the Matter of Jersey Central Power and Light Co., Docket No. 743-184 (5/28/74); *Elizabethtown Water Company*, Docket No. 727-606 (9/1/72); *Public Service Electric and Gas Company*, Docket No. 726-562 (5/31/72); and *In the Matter of Public Service Electric and Gas Company*, Docket No. 703-105 (10/29/70).

The Board finds that:

1. JCP&L will exhaust its short-debt limit under the RCA before the end of May.
2. Under current rates, JCP&L does not have sufficient coverages to sell long-term debt.
3. GPU, in its present financial condition, cannot sell common equity at a reasonable price.
4. Under current rates, JCP&L does not have sufficient coverages to sell preferred stock.
5. Overall, under existing rates, JCP&L will not be able to finance construction required to insure safe, adequate, and proper service.

Based on these observations, we conclude that JCP&L is eligible for interim relief.

Since the accident at Three Mile Island on March 28, 1979, the Board has committed significant resources to protecting the long-run interests of the ratepayers in JCP&L's service territory. Most recently, the Board has appealed directly to the Federal Energy Regulatory Commission for relief from the burdensome split-savings formula utilized in the pricing of PJM interchange sales. This formula has resulted in the imposition of 30 to 40% markups on cost for purchase power. These costs are ultimately placed on JCP&L's ratepayers.

In addition, the Board has drawn up an action agenda for soliciting Federal assistance. Most importantly, it is the Board's position that the costs of TMI-2 should be spread over a much broader base than just New Jersey and Pennsylvania ratepayers. The Kemeny and Rogovin investigations clearly establish that the cause of the accident at TMI was not solely limited to operator error but, in fact, was in part related to the structure of nuclear regulation in general.

The Board in Docket 795-427 (Phase I) directed JCP&L to seek out all possible purchase power agreements that would reduce the costs ultimately imposed on ratepayers. To date, the savings from these purchased power agreements have amounted to $26 million.

Further, the Board is vigorously directing JCP&L to successfully negotiate a contract for low cost power from Ontario Hydro. The Board will personally intercede on behalf of JCP&L ratepayers in these negotiations.

Finally, the Board is conducting two major investigations related to the TMI accident. First, the Board has initiated its inquiry into the question of JCP&L's potential *fault* in the accident. It is our intention to fully explore the underlying causes of the accident and the role played by the respective companies. Second, the Board has commissioned the Strategic Options Study which will determine what is the least cost option of supplying safe, adequate, and reliable service to JCP&L ratepayers.

Since the accident, the Board has taken action on numerous petitions relating principally to adjustments in the LEAC and the financing requirements of the company. Our objective in each of these cases has been a simple one: minimize the cost to ratepayers and keep JCP&L viable. Under present conditions, alternatives to JCP&L would prove extremely costly and potentially disruptive to reliable service.

It should be noted that of the some $234 million granted in rate relief since June, 1979, only 34% are directly related to the TMI accident. The remaining ⅔ of the increases are directly related to forces (principally OPEC oil increases) which are outside the control of this Board, JCP&L, and rate-payers. Unfortunately, all of us are subject to the whims of the powerful OPEC cartel. This Board will do all it can to break this dependence.

The record in this and other proceedings has clearly indicated the serious financial condition of the Company. The tremendous cash requirements imposed upon the Company by the need to purchase substantial replacement power occasioned by the outages of TMI-1, TMI-2 and Oyster Creek have placed the Company in a precarious financial position. In our Order of April 1, 1980, in Docket No. 795-427, was noted that Jersey Central had limited access to funds with which to maintain safe, adequate and proper service as required by *N.J.S.A.* 48:2-23. Since that time, the Company's ability to obtain credit and access capital markets

has further deteriorated. Most recently, the Banks involved in the Revolving Credit Agreement (RCA) have declined to increase the Company's $139,000,000 loan limit and have further refused to extend credit beyond the $110,000,000 now outstanding unless the Company agrees to pledge its accounts receivable as security for additional borrowings.

Furthermore, the Company has also requested the Board's approval to realize approximately $5 million from the sale of its interest in the 625MW Seward Generating Station now under construction. It is apparent that unless the Board approves these requests or provides some other form of relief, the Company may be unable to maintain the present level of safe, adequate and proper service.

Level of Interim Relief

In approaching the question of the appropriate level of interim, the Board has again used the objective of minimizing the cost to ratepayers and keeping JCP&L viable. It is our conviction that the cost to ratepayers can be minimized by providing the Company a vehicle to begin the process of reducing the costly short-term debt outstanding. Given current prime rates, these marginal rates are estimated to be in excess of 20 percent. Secondly, the Board is convinced that the company's ability to consummate the Ontario Hydro purchase can be positively impacted and can ultimately reduce the cost to Jersey Central ratepayers. We also believe that any relief be sufficient to guarantee continued reliable service.

The Board has reviewed Staff testimony and the Company's case. Based on the review, the Board is convinced that the public interest will be served by granting an increase in base rates of $60 million. We disagree with Staff on the issue of the $15 million attributable to acceleration of old deferred energy balances. We are convinced that by allowing the $15 million in terms of earnings available, the Board will maximize the benefits to ratepayers from the increase.

Let us now turn to the specific evidence that led us to conclude that $60 million in additional base revenues is the appropriate level of interim relief.

1. We accept the Staff position on the relevant test year, i.e., March 31, 1980
2. We adopt, as a reasonable estimate, a 13.75 rate of return on equity.
3. We adopt the capital structure without short-term debt included, and the respective costs of capital shown on attachment B.
4. We accept the Staff's rate base recommendation except that we recognize an additional $75,238,000 of construction work in progress. Therefore, for rate making purposes, we will use a net investment rate base of $1,222,631,000 for the purposes of testing, on an interim base, the reasonableness of the level of relief.
5. The resulting rate of return (10.12 percent) applied to a net investment rate base of $1,222,631,000 yields an operating income of $123,730,000 less $94,935,000 of pro-forma operating income that results in a deficiency in operating income of $28,795,000 when multiplied by the tax factor (2.1086) results in additional revenue requirements of $60,717,000 (say $60 million).

Based on the above analysis, we are satisfied that an interim increase of $60 million in base revenues is required.

III. Docket No. 795-508A (Pledge of Accounts Receivable)

The Board has heard extensive testimony by the petitioner as well as representatives of the agent banks on the necessity of JCP&L pledging its accounts receivable for the $60 million in draw-downs under the RCA. It is clear from that testimony that the Banks are very concerned with the ongoing risk associated with the regulatory environment in New Jersey, Pennsylvania, and the Nuclear Regulatory Commission in Washington. Given these uncertainities, the Banks argue that the pledge is required to justify their increased exposure of $60 million.

It is our opinion that, at the time of the filing of the petition for pledging the accounts receivable, the Banks had a reasonably sound argument for requesting such a pledge. However, based on the evidence developed in these hearings, the Board now believes that the major concerns of the Banks have been met. In particular, we note that the Banks identified the following factors as support for the request to pledge the accounts receivable.

1. Deterioration of JCP&L's earnings as a result of the Board's decision to remove TMI-1 from base rates.

The Board is convinced that the decision to remove TMI-1 from base rates was justified and totally consistent with its sharing concept enunciated in Docket No. 795-427. The present interim rate relief granted above should totally remove the Banks' concern for JCP&L earning capacity and ultimately coverages. It is clear from our analysis that the interim order should allow JCP&L to sell long-term debt and thereby reduce the financing costs of the firm.

2. Extended outage of Oyster Creek.

It is clear that the Company is well along in receiving NRC approval for the necessary repairs of this unit. We have been advised that written approval is imminent. Therefore, this concern has been substantially removed and may be totally removed in the near future.

3. Question of non-earning assets (i.e., TMI-1, TMI-2, and Forked River).

The Board cannot control the availability of TMI-1 and TMI-2. However, the Board has actively interceded on behalf of Jersey Central ratepayers with the NRC. Specifically, the Board has repeatedly pointed out to the NRC the financial burdens imposed on Jersey Central ratepayers by the continued unavailability of TMI-1. The Board has urged the NRC, subject to all relevant safety and health precautions, to return TMI-1 to service. The issue of Forked River will be addressed by the Board in the main case.

4. Concern with the regulatory environment in Pennsylvania.

> The Board takes note that the Pennsylvania Commission has recently awarded Met-ED/Penelec substantial revenue relief, in fact, in excess of what the companies requested. Further, the Pennsylvania Commission has also ruled that the Met-Ed franchise should not be revoked. Clearly, these are extremely positive developments in Pennsylvania.

Overall, we believe that the foundation for the pledge of the accounts receivable has been substantially eroded. Therefore, we are confident that the need for the pledge no longer exists.

However, it is important to note well that the Board continues to share everyone's concern for the expeditious return to service of the Oyster Creek unit. Adverse developments, remote as they may be, still require Board recognition. Therefore, if Oyster Creek suffers a substantial setback in its return date, the Board will review the merits of reinstating the request for the pledge of accounts receivable. In addition, the Board will expeditiously address the impact of such development on the Company's deferred energy balances and possible resolution vis-a-vis a LEAC proceeding. We, therefore, conclude that it is in the public interest to deny the petition for the pledge of accounts receivable without prejudice.

IV. Docket 803-172 (Transfer of Seward 7)

The petitioner requested authorization to sell its interest in Seward 7 for some $5 million. The proceeds of the sale were to be used to shore up an emergency demand for cash. It is recognized by all parties that the foundation for the sale was the pressing need for cash. However, all parties also agree that were the cash position improved, the need to sell Seward 7 would be eliminated. Based on the testimony of Mr. Baldassari, we are convinced that the prospective $10 million reduction in the PJM interchange bill in and of itself is sufficient to abrogate the need for the sale. But, more importantly, the recommended interim relief surely removes the necessity for selling this potentially economic coal-fired generating capacity. Therefore, the Board

denies JCP&L's petition to sell its interest in Seward 7 without prejudice.

Rate Design

The petitioner initially proposed that all of the interim increase be allocated to general service customers. Subsequently, petitioner witness Carter developed some alternative approaches to recover any interim increase. After evaluating that testimony and considering fundamental equities, we have concluded that the interim increase should be allocated in the following manner:

Rate Group	Allocated Increase	Overall % Increase
Residential	$ 7,369,568	1.89
General Service	50,934,530	11.05
Lighting	1,695,902	13.83
Total Retail	$60,000,000	6.95

The residential increase will be effectuated through a $1.00 per month increase in the customer charge. This will produce some $7.6 million of the $60 million in interim relief. The remaining $53 million will be recovered from the General Service and Lighting customers. On balance, we feel assured that the relevant competing equities have been appropriately addressed.

The Board recognizes that the rate design we hereby adopt is provisional in nature subject to modification in the main proceedings, just as the amount of rate relief provided is provisional, and subject to refund. *In re Sand Rates*, 66 N.J. 12. Considering the present record and cognizant that the parties will address appropriate rate design factors in the main proceedings, such as a detailed identification and allocation of appropriate costs to demand and energy, the Board concludes that its allocation above, is reasonable on an interim basis.

The latest cost of service study in the Jersey Central proceedings Docket No. 7610-1021 (Exhibit JC-202) supports this level of increase on a cost of service basis. We recognize this allocation is provisional and subject to possible modification through up-

dated cost of service and other relevant rate design testimony in the main proceedings. We emphasize that the impact of the above approach is to increase residential bills by 1.9%.

The remainder of the provisional rate increase (approximately $52.4 million dollars) will be allocated to GS customers on a provisional across-the-board basis between energy and demand charges. Again, we recognize that additional testimony will be required, e.g. comparing cost factors related to peak usage or demand and comparing unitized rates of return, before this rate design may be embodied in a final Order. The effect of this allocation will be to increase GS rates by approximately 11%.

We have therefore cushioned the impact of this increase to the residential customer to the extent that we believe is legally permissible. To go further would fly in the face of *N.J.S.A.* 48:3-1 and 4 which prohibits undue preferences in rate making or discrimination in rates between classes. We believe that the above rate design is within the substantial discretion that this Board is permitted to design rates since they are reasonably related to proper purposes such as consistency of treatment, cost of service and conservation. *In re Essex County Welfare Board,* 126 N.J. Super 417.

Special credits were found reasonable to induce all electric consumption, *Rossi* v. *Carton,* 88 N.J. Super 233. Special concessions to builders for all electric service were found not to be discriminatory. *Watkins* v. *Atlantic City Electric Company,* 67 PUR 3rd 483. We do not read the post hearing memorandum of the Public Advocate nor the precedents cited therein, including *In re St. Paul Chamber of Commerce,* (251 Northwest Reporter Second Series) 350, as legally requiring another position. Indeed, in that matter the Minnesota Supreme Court found an allocation rates placing a substantial portion of the increase on the commercial and industrial customer to be reasonably related to proper rate-making considerations, such as cost of service and the customer's ability to pay.

The details of the tariff design, are specified in Exhibit A attached hereto and made a part hereof, are substantially accurate subject to technical review by the parties. We recognize that our regulation, *N.J.A.C.* 14:1-6.16, provides for a review period after Board Order, before rates are implemented. But due to the compelling emergent nature of this matter, we waive the technical requirements of our regulation. We stand ready, however, on motion to the Board or in the context of the main proceeding to revise any details of Petition's tariffs which do not comport with this Order.

It is therefore crystal clear to us that unless responsible action is taken by utility management, the financial community, this Board and the appropriate federal agencies, this utility cannot remain viable and provide service to its customers. If the financial community or specific creditors perceive that management is not acting responsibly, by not really perceiving the nature of the financial crisis at hand, insolvency may result. It is in this context that we view management's recent step of awarding substantial raises to its officers as most unfortunate. It is not only the amount of the funds involved, at a time when regular employees are being laid off, that is at issue. Objective consequences and risks flow from management's action. The cash flow from lenders and customers—the life's blood of the utility—could be impaired by their perceptions of that action.

ADDITION: Paragraph 2 under ORDERS add (with this Order and subject to evidence produced in the main proceedings.)[8]

In addition, the Board is proceeding at the Federal level to obtain relief from the onerous split savings method at the Federal Energy Regulatory Commission. Any relief depends upon a sympathetic response by the utilities, Public Utility Commissions, and Rate Counsels that comprise the PJM Power Grid. Any unfounded perception that relief is not urgently needed must, be quickly rectified.

Under normal circumstances we would have no difficulty with the rationale that key management should be rewarded and motivated. Nor would we attempt as a general rule to intrude ourselves into matters which have been usually considered management's prerogative. But management actions including salaries are subject to scrutiny.[1] Where management actions impact on the actions of others which could bring this company to its knees, this Board must act pursuant to a general authority to secure safe, adequate and proper service to New Jersey residents.[2]

We find this management action to be unreasonable and conclude under present circumstances that to merely disallow such increase for rate making purposes[3] would be an insufficient remedy. There is authority under circumstances of financial jeopardy to prohibit dividends, service fees and the like where such actions could deteriorate utility property or impair service to the public.[4] We will therefore **Direct** and **Order** that the recent increases to the officers of JCP&L be rescinded forthwith.

Based upon the record in these proceedings, and the findings we have made herein, the Board **ORDERS** as follows:

1. Petitioner is authorized on an interim provisional basis to increase base rates in the amount of $60 million dollars according to the rate design we have specified herein.

2. The tariff the company has submitted in compliance with this Order is **HEREBY ACCEPTED** for service rendered on and after May 15, 1980, on an interim provisional basis subject to refund, subject to review as to whether it fully comports with this Order and

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1. *Community Utilities Corporation* v. *Metropolitan Dade County Water and Sewer Board*, 64 PUR 3rd 210, (1966). *New England Tel. and Tel. Co.* v. *PUC*, 358 A 2d 1,16 (1976).

2. *N.J.S.A.* 48:2-23.

3. *Re K.I.M. Telephone Company*, 13 PUR 3rd 112, (1951).

4. *Elyria Telephone Company* v. *Public Utilities Commission*, 110 N.E. 2d 59, (1953); citing *Ohio Central Telephone Corporation* v. *Public Utilities Commission*, 189 N.E. 650, (1934).

subject to evidence produced in the main proceedings.[5]

3. The Petition to sell the Seward #7 coal-fired facility is **DISMISSED** without prejudice.

4. The petition for Board approval of a pledge of accounts receivable as security under RCA is **DISMISSED** without prejudice.

5. Petitioner shall not pay to GPU any dividends during the remainder of 1980.

6. Petitioner shall advise this Board 30 days in advance of any proposed dividends during 1981 so the Board can evaluate the financial condition of petitioner.

DATED: May 13, 1980

BOARD OF PUBLIC UTILITIES
BY (SIGNED)

(SEAL)

GEORGE H. BARBOUR
PRESIDENT

EDWARD H. HYNES
COMMISSIONER

ATTEST:

(SIGNED)
GERALD A. CALABRESE
SECRETARY

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5. JCP&L shall give notice to its customers, by advertisement in newspapers published and circulated in its service areas, to the effect that the Board has authorized JCP&L to increase its rates on an interim basis as herein authorized, which notice shall contain a summary of the new rates and that new rates shall become effective for all service rendered on an after May 15, 1980.

Attachment A

JERSEY CENTRAL POWER & LIGHT COMPANY
ALTERNATIVE METHOD OF ALLOCATING INTERIM INCREASE REQUEST OF $60,000,000 (RESIDENTIAL INCREASE TO CUSTOMER CHARGE ONLY/ NON-RES INCREASE ACROSS BOARD ON BASE REVENUES)

Line	Rate Group (1)	Norm(1) Cust (2)	Normalized Sales(2) mWh (3)	Normalized Base Revenues(3) (4)	Allocated Increase (5)	Total Normalized Revenues(4) (6)	Overall Increase (7)=(5)÷(6)
	Residential						
1	No-WH	474,137	2,868,573	174,650,445	$ 5,489,969(5)	$238,243,840	2.30%
2	Unc WH	41,157	468,516	23,568,256	480,063(5)	33,954,787	1.41
3	Total Elec.	79,199	1,342,932	59,352,529	904,841(5)	89,123,989	1.02
4	Cont WH	42,275	403,180	19,918,110	494,695(5)	28,856,207	1.71
5	Total Res.	636,767	5,083,201	277,489,340	$ 7,369,568	$390,178,823	1.89
	General Service						
6	Secondary	70,282	4,275,108	198,209,230	$34,006,211(6)	$292,984,099	11.61%
7	Primary	218	1,418,314	46,420,070	7,898,703(6)	76,899,638	10.27
8	Transmission	80	1,832,964	52,708,350	9,029,616(6)	91,011,799	9.92
9	Total GS	70,580	7,526,386	297,337,650	$50,934,530	$460,895,536	11.05%
	Lighting						
10	OL	80,884*	11,629	1,298,060	$ 196,434(6)	$ 1,555,863	12.63%
11	SL	861	87,350	8,769,509	1,449,468(6)	10,705,971	14.01
12	Total Lighting	861	98,980	10,067,569	$ 1,695,902	$ 12,261,834	13.83%
13	Total Retail	708,208	12,708,566	594,953,072	$60,000,000	$863,336,193	6.95%

Notes:
(1) Per Exhibit JC-201, Schedule 2, Page 1 of 2, Col. 7
(2) Per Exhibit JC-201, Schedule 2, Page 1 of 2, Col. 6
(3) Per Exhibit JC-201, Schedule 2, Page 1 of 2, Col. 2
(4) Per Exhibit JC-201, Schedule 1, Col. 4
(5) Based on $1 per month increase in cust. charge
(6) ($60,000,000 total increase—$7,369,568 res. incr.) ÷ $307,405,219 total norm GS + Lgt. revenues = 17.1209% incr. times Col. (4)
(*) Supplemental service, therefore, not included in customer count

Attachment B

JERSEY CENTRAL POWER & LIGHT CO.

COST OF CAPITAL ANALYSIS

($000's)

13.25% Return on Equity, No Short-Term Debt

	Amount	%	Cost	Rate of Return
Long-Term Debt	$893,682	49.48	8.27%	4.09%
Preferred Stock	205,000	11.35	9.17	1.05
Common Equity	654,605	36.24	13.25	4.80
Cost Free Capital	52,815	2.93	—	—
				9.93%

13.75% Return on Equity, Short-Term Debt Included

	Amount	%	Cost	Rate of Return
Long-Term Debt	$893,682	47.65	8.27%	3.94%
Preferred Stock	205,000	10.93	9.17	1.00
Common Equity	654,605	34.91	13.75	4.81
Short-Term Debt	69,027	3.68	15.04	.55
Cost Free Capital	52,818	2.83	—	—
				10.30%

APPENDIX C-2

Decision and Order

STATE OF NEW JERSEY

DEPARTMENT OF ENERGY
BOARD OF PUBLIC UTILITIES
1100 Raymond Blvd.
Newark, New Jersey 07102

DOCKET NO. 804-285
OAL DOCKET NO. PUC 3518-80

IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND LIGHT COMPANY FOR AN INCREASE IN RATES AND CHANGES IN THE TARIFFS FOR SUCH SERVICE

SERVICE LIST ATTACHED

BY THE BOARD

On April 29, 1980, Jersey Central Power & Light Company (Petitioner, Company), a public utility of the State of New Jersey subject to the jurisdiction of the Board of Public Utilities (Board), filed a petition requesting an increase in its rates in the amount of $173.5 million. At the time of filing, Petitioner requested interim relief in the form of an immediate increase of $60 million which was granted by the Board, after hearing, by Order dated May 13, 1980.

Subsequent to its ruling on Petitioner's motion for interim relief, the Board transmitted this matter to the Office of Administrative Law for hearings pursuant to *N.J.S.A.* 52:14F-1, *et seq.* The Board, in addition, transmitted a Levelized Energy Adjustment Clause matter involving the Company, Docket No. 807-488, which was consolidated with the base rate case. This portion was resolved by the Board in an Order dated October 2, 1980.

At the conclusion of the base rate case, at the suggestion of the parties, the briefing of issues was divided into two sections, revenue requirements and rate design. Administrative Law Judge Stephen Marshall submitted his Initial Decision on revenue requirements on May 11, 1981. His Initial Decision on rate design was submitted on March 11, 1981.

REVENUE REQUIREMENT

RATE BASE

Petitioner, in its filing, showed its rate base at test year end to be $1,364,031,000 which was adjusted for certain known and anticipated changes and which included the elimination of TMI-2. The rate base calculation of the Board's Staff of $1,268,946,000 and Rate Counsel's calculation of $1,225,166,000 essentially accepted Petitioner's test year end rate base as adjusted except for figures related to TMI-1, construction work in progress and working capital.

The Administrative Law Judge has adopted the position of the Company, placing TMI-1 back into rate base. Staff and Rate Counsel had argued that Petitioner's portion of ownership of TMI-1, of approximately $97.8 million, continue to be excluded from rate base.

The events stemming from the March 28, 1979 accident at Three Mile Island are adequately set forth by the Administrative Law Judge in his Initial Decision. On June 18, 1979, in Docket No. 795-427, this Board determined that as a result of the severe damage to TMI-2 that Unit was unlikely to return to service for two to four years and, was, therefore, no longer used and useful for rate-making purposes. The basis for the action of the Board in removing TMI-2 from rate base was that ratepayers should not be required to pay both the replacement energy costs related to TMI-2 and the capital and operating expenses associated with that unit.

On April 1, 1980, the Board, in the same docket, determined that the uncertainty associated with the future availability of

TMI-I warranted its removal from rate base as its continued inclusion would violate the basic ratemaking premise which is not used and useful in rendering utility services for a considerable time. The Board further held that to include TMI-1 in rate base would be inconsistent with the equitable sharing principles previously established for TMI-2. The removal of TMI-1 from Petitioner's rate base was subsequently upheld by the New Jersey Supreme Court in a decision rendered on April 8, 1981. 85 *N.J.* 520 (1981).

Based upon a review of the record in the pending matter and the Initial Decision, the Board is of the opinion that circumstances have not changed sufficiently to warrant TMI-1 being placed back into rate base at this time. There have been many delays in bringing this unit back on line and we continue to support the treatment of TMI-1 as set forth in the Board's order of April 1, 1980 in Docket No. 795-427. As it is our position that TMI-1 should not be placed back into rate base until restart, we reject that portion of the Initial Decision which calls for its inclusion. At the time of restart, the Board will consider, in expedited proceedings, the appropriate rate base and revenue adjustment related to the TMI-1 return to service.

With regard to CWIP, the Petitioner proposed the inclusion into rate base of $61,211,000 while Rate Counsel recommended a figure of $5,943,000. The Administrative Law Judge adopted Staff's recommendation of $49,719,000 which represents Petitioner's test year end CWIP balance. It should be noted that the Board in recent years has allowed some level of CWIP in rate base due principally to the nature and amount of investment by electric utilities. Indeed, CWIP in the amount of $54,576,000 was included in rate base in Petitioner's last base rate proceeding in Docket No. 7619-1021. As properly noted by Staff, CWIP without an offset has been accepted by this Board as a necessary mechanism by which the utilities of this State may realize adequate earnings to meet those service demands created by their customers.

Based upon our review of the record, we agree with Staff that the figure of $49,719,000 may understate the level of construction that Petitioner may be expected to undertake in the next few years. Accordingly, the Board is of the opinion that a figure of $55 million is justified by the record and that it is not unreasonable to conclude that the company will maintain this level of construction. We therefore accept the inclusion of $55 million of CWIP into rate base as a representative figure over the short term.

We further adopt the working capital figure of $136,107,000 recommended by Staff and Rate Counsel and accepted by the Administrative Law Judge.

Based on the foregoing, the Petitioner's rate base is set at a level of $1,274,223,000.

Operating Income

Petitioner showed its net utility operating income for the twelve months ended December 31, 1980, to be $111,440,000. After making adjustments thereto, Petitioner calculated its adjusted pro-forma utility income at $94,586,000 while Staff and Rate Counsel recommended income levels of $112,237,000 and $117,813,000, respectively. The differences stem from differing positions on certain proposed adjustments to operating expenses: tree trimming; reclassification of charitable contributions; TMI reserve capacity adjustment and Forked River adjustment.

The position of the Staff and Rate Counsel with regard to these expenses were, for the most part, similar and were accepted by the Administrative Law Judge with the exception of a tree trimming adjustment.

After full consideration, the Board is of the opinion that the record adequately supports the level of tree trimming expense proposed by the Petitioner and accepted by the Administrative Law Judge and we adopt it as reasonable and proper. The Company is *HEREBY ORDERED* to expend the full amount for the purpose indicated.

With regard to the treatment of the charitable contributions as a below the line expense, we find that the testimony presented by Rate Counsel and supported by the Staff is reasonable and therefore adopt it. This results in a downward adjustment in this expense of $37,000.

We also adopt the downward adjustment to the TMI Reserve capacity adjustment of $4,839,000 with regard to TMI-1 and $3,205,000 with regard to TMI-2 as recommended by Staff and Rate Counsel. It should be noted that these expenditures have not been incurred or booked. The record also indicates that the effect of the forecasted obligation to PJM cannot be accurately measured until 1983. While we find that the inclusion of this expenditure is inappropriate at this time, we will not foreclose the possibility of its allowance at a future date.

The procedural history of the Forked River Project, culminating in its abandonment, has been adequately set out in the ALJ's Initial Decision and the filings of the parties.

The total loss of this project booked by Petitioner as of November 30, 1980, was $413,700,000. Petitioner has recommended that this investment be amortized over a period of 15 to 20 years and that a return on the unamortized portion of the investment be allowed until the investment has been fully written off. Alternatively, the Company suggests that the amortization take place over a 10 year period without the unamortized investment being included in rate base.

Rate Counsel and Staff recommend that there be a sharing of the loss between the Company's stockholders and ratepayers. Staff has adopted Rate Counsel's adjustments to the total loss booked as of November 30, 1980 of $413,700,000.

These adjustments are:

(1) $1 million received from sale of a crane;
(2) $2.7 million profit on sale of uranium since November 30, 1980;
(3) Assignment of enrichment contract in the amount of $14.6 million;
(4) Net deferred income tax of $142.6 million; and

(5) AFUDC accruals subsequent to April 4, 1979 of $26.9 million.

It should be noted that inherent in Petitioner's calculation of its Forked River abandonment loss is AFUDC booked on the project subsequent to the decision to suspend construction activities on April 4, 1979. Rate Counsel, supported by Staff, has argued that no rate treatment be permitted for this AFUDC where a project has been suspended indefinitely or abandoned. The Board is of the opinion that the record contains sufficient evidence to support the position that the project was indefinitely suspended as of April 4, 1979 and we adopt the treatment of AFUDC booked subsequent to that date as proposed by Rate Counsel and Staff.

Rate Counsel has recommended that the loss be amortized over a 15 to 20 year period while Staff has suggested a 15 year period. Both parties recommend that the unamortized balance receive no rate base treatment. As there is sufficient support in the record, we adopt the adjustments recommended by Rate Counsel and Staff and the amortization treatment suggested by Staff as both reasonable and consistent with past Board policy regarding abandonments.

Related to the aforementioned adjustment, the Petitioner has made some effort regarding the issue of salvage. The adjustments for salvage recommended by Rate Counsel and Staff occurred during the test year. We add to this the sale of structural steel in the amount of $862,000 that was approved by the Board on May 7, 1981, in Docket No. 814-416, and hold that all other salvage transactions completed subsequent to the test year be considered in future base rate filings.

The above, including the sale of steel, results in a net abandonment loss of $225,398,000 and an annual revenue requirement of $31,684,000.

Rate Counsel recommends that the Board reduce Petitioner's operation and maintenance expense by $3.9 million that represents non-recurring costs resulting from the Sparger outage. The net of tax effect on income is $2,106,000. While the Board does not dispute Rate Counsel's analysis of these expenses, we feel that

this recommendation must be rejected in light of the planned shut down of the Oyster Creek nuclear generating facility for refueling for a period of at least 6 months during the life of these rates.

As it is apparent that Petitioner will incur costs far in excess of the amount aforementioned, we will not reduce its operating and maintenance expenses as recommended by Rate Counsel.

Rate of Return

The resolution of issues related to rate of return, in particular that portion dealing with return on equity, is, at best, a complex and controversial undertaking. Capital and credit markets reflect the consensus judgment of investors who direct resources to their highest marginal returns. Capital flow in response to risk/reward relationships and failure to compete effectively for funds leads invariably to capital shortages.

The ultimate purpose of the Board is to insure that the 700,000 customers of the Company continue to receive safe, adequate and proper service. The Board is well aware that the realization of this goal is dependent on the Petitioner's continued viability, both operational and financial.

We are of the opinion that the rate of return methodology utilized by Rate Counsel does not fully take into consideration the present and prospective risks facing the Petitioner and does not accurately reflect capital market realities.

The Company has taken the position that it requires additional revenues in order to maintain its viability despite the regulatory treatment that has been applied to its assets. To support this view, the Company asserts that its true cost to serve its customers includes costs and carrying charges that have been disallowed but are still an obligation of the Company. This would include the previous elimination from rate base of TMI-1 and the removal of AFUDC accruals on Forked River subsequent to April 4, 1979 ordered by the Board herein. These actions are consistent with past Board policy.

The extraordinary events associated with Three Mile Island and their financial impact on the Company further complicates

the measurement of an appropriate rate of return. The Board has been well aware of the extraordinary nature of the TMI accident and the attendant regulatory problems and uncertainties facing the petitioner.

In identifying and dealing with these problems, the Board has taken many unique actions. These include, among others, the approval of an unprecedented Revolving Credit Agreement, the allowance for accelerated amortization of deferred energy balance, intervention in the Federal Energy Regulatory Commission "split savings" proceedings on behalf of Jersey Central rate-payers, support for the early return to service of TMI-1 consistent with public health and safety, financial inducement to the Company to pursue purchases outside the PJM system, and support of Federal sharing of the TMI-2 clean up costs.

Based upon our review of the testimony related to these issues and the risks involved, we are of the opinion that the record adequately supports as reasonable an overall rate of return of 10.68%. This figure is based upon a finding of the cost of equity of 15% which is the highest level allowed a New Jersey utility by the Board as of this time. The Board will continue to monitor this level carefully in subsequent rate filings.

This allowed rate of return applied to the net investment rate base of $1,274,223,000 results in an operating income requirement of $136,087,000, less Petitioner's pro forma operating income of $112,037,000 resulting in an operating income deficiency of $24,050,000.

Giving effect to the revenue tax factor of 2,1086, Petitioner would be entitled to additional annual revenues of $50,712,000 over the interim rate relief of $60,000,000 authorized by the Board in its Order of May 13, 1980 in this docket.

RATE DESIGN

In an era of high electric rates, the question of who pays in what proportion becomes a question of great significance. Rate design has become as essential as the determination of the revenue requirement. When there is no disagreement that the utility is

entitled to a certain amount of money, as is the case here, the division of that amount among the various inter-and intra-class ratepayers is of as great importance as the actual dollar figure. The Board's decision in this case should be a signal to the industry that the matter of rate design is viewed with great importance by this Board.

Inter-Class Rate Design

The Board is of the opinion that cost of service is the best method for determining which pricing methodology will be used in rate design. However, it must be pointed out that cost of service is subjective in many ways and a cost of service study, for this reason, should be used as a pathfinder or guideline in determining actual tariff designs rather than as a precise mathematical formula. Therefore, the Board agrees with the Administrative Law Judge's acceptance of Petitioner's data base for the Cost of Service study. As the Judge pointed out, there are inherent problems in any cost of service study caused by the necessary estimations and imprecisions in the data. To reject a study, on this basis, would, in the opinion of the Board, serve no valid purpose at this time.

Historically, allocation of demand has been done by use of a Coincident Peak/Non-Coincident Peak formula. However, today we are seeing new base load plants constructed to replace more expensive plants, not just for expansion of the market for electricity. This phenomenon supports an Average and Excess formula for generation and bulk transmission plant. Average and excess allocates plant on the basis of both class energy use and class coincident peak demand.[1] Both are important in system planning and both are particularly recognizable in generation and bulk transmission plant. This dual dimension in system planning is not as identifiable in other types of plant. Because of this factor, along with the Board's commitment to continuity in

1. The average and excess factor is developed by weighing a class' share of average demand (relative to the system) by system load factor, and weighing a class' coincident peak share by (1-load factor); and then adding the two weights.

rates, subtransmission and distribution plant will be allocated on a non-coincident peak formula. By adopting this new formula the Board is recognizing that capacity is not determined solely by system peak requirements but also by total energy use over the entire year.

Another area of inter-class rate design to be addressed is functionalization of accounts in a proper manner. Based upon the rationale above, that new base load plants are energy-related functions, the Board is of the opinion that the Forked River Abandonment should be allocated on an energy basis for bulk transmission and generation plant. Those who use the most electricity should pay the most for Forked River. The amortization period for this abandonment will be fifteen (15) years.

Transmission maintenance expenses will be functionalized as energy-related since they do not vary with demand. Fuel stock will also be allocated on an energy basis. Distribution system costs will be functionalized according to Jersey Central's "zero size system" approach.

The Board believes that the allocation of fuel costs among customer classes should be on an equalized cents per kwh basis rather than the variable price differential, based on on-peak/off-peak usage, recommended by the Administrative Law Judge.

Intra-Class Rate Design

Residential Service:

The Board adopts the reasoning of the Administrative Law Judge and grants Petitioner's proposed changes regarding increased customer charges and increased summer-winter differential. Additionally, the Board feels that the water heating subsidy should be reduced by 50%, a possible first step toward total elimination in the next rate case. This subsidy has been in effect since 1976 and has resulted in the utility's other customers subsidizing $4,000,000 each year of this class. The revenues collected through the elimination of this rate should be spread across the initial blocks of both the summer and winter residential service tariff. Another area where one ratepayer subsidizes another is in

the all-electric block of the residential tariff. Fairness requires a shift to reduce this subsidy. Therefore, the Board hereby establishes as Board policy the discontinuation of this subsidy for new all-electric homes by January 1, 1984. The Company is requested to make every effort to put customers and potential customers on notice of this termination. Moreover, as an effort to gradually remove the subsidy which exists for present all-electric homeowners, the tail block of the RS tariff should be increased by 10%.

General Service:

The Board is of the opinion that the third block of the GS-S tariff should be eliminated as a step towards the termination of the non-cost justified declining block structure.

The Board agrees with the Administrative Law Judge that mandatory time-of-day rates should be implemented in both the GS-P and GS-T classes. In accordance with the average and excess method adopted today, the GS-P a GS-T energy and demand portions should be reallocated with a larger share in the energy portion.

The General Service minimum customer charge ratchet unfairly penalizes high seasonal demand customers and accordingly should be modified to 50% of the present charge. The Board also agrees with the Administrative Law Judge that the level of curtailable credit should be raised to $2.50 per kwh.

STANDARD TERMS AND CONDITIONS:

The Board will allow charges for uncollectible checks in the amount of $8. This is intended to include any charges that the Company is assessed by its bank.

A late payment charge will be allowed at the Company's overall rate of return. A grace period of 45 days should be allowed, 60 days for governmental entities.

The reconnection charge requested by petitioner is denied but the Company may resubmit it during its next rate case.

The Board also is of the opinion that non-TMI-related Levelized Energy Adjustment Clause rates should be rolled into the base rates adopted in this case. This results in an energy adjustment of 6.265 mills/kwh prior to voltage adjustments.

The Board, in taking a more active role in rate design, wishes to signal to the industry that innovative rate making is an idea whose time has come.

The development of reasonable co-generation projects, and the acceleration of conservative methods or alternative sources of energy, (for instance lowhead hydro projects) are also of major concern to this Board.

After investigation and consideration of the entire record herein, the Board **HEREBY FINDS** that:

1. The petitioner is entitled to revenues in the amount of $110,712,000 including $60,000,000 of interim relief.

2. The petitioner's overall rate of return should be 10.68% and its rate of return on equity should be 15%.

Therefore, based upon the foregoing, the Board **HEREBY AUTHORIZES** an increase in rates as specified in this Decision and Order and, **HEREBY ACCEPTS** the tariffs submitted in accordance with the rate design herein, for service rendered on and after the date of this Order.

On Thursday, July 23, 1981, the Board issued an oral decision in this matter. This decision set forth the revenue requirement and the outline for tariff design that the Board wished to be followed in this case. On July 24, 1981 the company submitted proposed tariffs which have been the subject of ongoing discussions among Staff, the Public Advocate, the company and the Intervenors.

The Board is of the opinion that these discussions satisfy the requirements of N. J. A. C. 14:1-6.16 (a) (5) (i), regarding parties opportunity to be heard on proposed tariffs. Based upon the authority found in N. J. A. C. 14:1-1.1 and 14:1-1.2, the Board **HEREBY WAIVES** the five (5) day period for written comments on the proposed tariffs. This waiver is based upon the damage that could be done to the company delaying implementation any

longer and the fact that all parties have had an opportunity to be heard in this matter.

DATED: July 31, 1981
(SEAL)

BOARD OF PUBLIC UTILITIES
BY (SIGNED)

EDWARD A. HYNES
COMMISSIONER

BARBARA A. CURRAN
COMMISSIONER

ATTEST:
(SIGNED)

GERALD A. CALABRESE
SECRETARY

APPENDIX C-3

DECISION AND ORDER

STATE OF NEW JERSEY
DEPARTMENT OF ENERGY
BOARD OF PUBLIC UTILITIES
1100 Raymond Blvd.
Newark, New Jersey 07102

BPU-DOCKET NO. 818-726
BPU-DOCKET NO. 818-736
OAL DKT. NO. PUC 6152-81

IN THE MATTER OF THE PETITION OF JERSEY CENTRAL POWER AND LIGHT COMPANY FOR APPROVAL OF AN AMENDMENT OF ITS TARIFF TO PROVIDE FOR AN INCREASE IN RATES AND CHARGES FOR ELECTRIC SERVICE AND A REVISION IN DEPRECIATION RATES

Jack B. Kirsten, Esq., and Dolores M. Delabar, Esq., for the petitioner, Jersey Central Power and Light Company, William F. Hyland, Esq., and James Liberman, Esq., of the New York Bar, of Counsel (Kirsten, Friedman & Cherin, Attorneys)

Alfred Nardelli, Director, Division of Rate Counsel, Public Advocate, Raymond E. Makul, Deputy Public Advocate, William Roughton, Assistant Deputy Public Advocate, Linda Lodenkamper, Assistant Deputy Public Advocate, for the Division of Rate Counsel, Intervenor

I. Paul Slevin and Lucie Hirmina, for the Staff of the Board of Public Utilities

Diane Fahey, Intervenor, *pro se*

Robert Westreich, Esq., Assistant Essex County Counsel, for the Counties of Essex, Sussex, Warren, Mercer and Monmouth, and the New Jersey Association of Counties, Intervenors (David Ben Asher, Essex County Counsel, Attorney)

John C. Sahradnik, Esq., Assistant Ocean County Counsel, for the County of Ocean, Intervenor (Berry, Summerill,

Piscal, Kagan & Privetera, Esqs., Ocean County Counsel, Attorneys)

Cornelius Turner, Esq., for the Federal Executive Agencies, Intervenor

Richard B. McGlynn, Esq., for Air Products Company, Intervenor (Stryker, Tams & Dill, Attorneys)

William R. Watkins, Esq., for Industrial Energy Users, Intervenor (Lindaberry, McCormick & Estabrook, Attorneys)

Ann S. Babineau, Esq., for the Middlesex County Utilities Authority, Intervenor (Wilentz, Goldman & Spitzer, Attorneys)

John Quain, Esq., of the Pennsylvania Bar, for the American Society of Utility Investors, Participant

BY THE BOARD:

I. INTRODUCTION

On August 11, 1981, Jersey Central Power and Light Company (JCP&L or Petitioner) filed a petition with the Board of Public Utilities (Board), pursuant to *N.J.S.A.* 48:2-21 and 48:2-21.1, seeking an increase in its charges to retail electric customers of approximately $238.5 million annually to become effective for service rendered on and after September 15, 1981. This requested amount was later reduced to $215.4 million. Petitioner also filed a motion for interim relief (Stage I) requesting $42.5 million on an annual basis to become effective October 1, 1981. This reflected the revenue impact associated with the anticipated return to service of TMI Unit No. 1.

On September 4, 1981, the Board informed all parties to the proceeding that it would retain the Stage I issues including the request for cessation of depreciation on TMI-I (Docket No. 818-736), and indicated that a record would be developed on the remaining issues (Stage II) by the Office of Administrative Law. On January 8, 1982, the Petitioner filed a stipulation to Stage I, which resolved most of the cost issues involved and left unresolved

the timing of the implementation of the interim relief. This issue was ultimately heard in Stage III.

After notice, four public hearings on the Stage II request were held throughout the Petitioner's service territory on November 2, 4, 5 and December 8, 1981. Evidentiary hearings were held on twenty days from November 16, 1981 through March 5, 1982 before Administrative Law Judges Walter F. Sullivan and Ronald I. Parker. Active parties to the base rate proceedings included the Board's Staff, the Department of the Public Advocate, Division of Rate Counsel, the U.S. Army, the County of Essex and Joint Counties Association, Air Products, Ocean County Board of Chosen Freeholders, Industrial Electric Energy Users Association, and the American Society of Utility Investors.

The Public Advocate and County of Ocean once again put forth their motion regarding the "Fault" issue. This has been a continuing motion in all of Petitioner's proceedings since the March 28, 1979 incident at Three Mile Island, seeking no rate increases until the Board determines Petitioner's responsibility in the incident. When it became evident that these parties viewed certain TMI-II issues in Stage II as related to the issue of "Fault", the Board requested that all TMI issues be returned to the Board for determination. This was in conformance with the Board's oft repeated position on the "Fault" issue.

The record in Stage II was completed before Administrative Law Judge Ronald Parker on March 5, 1982. Petitioner at that time argued that a revenue requirement determination by Judge Parker would be extremely difficult due to the fact that the case has been divided into three segments. With the consent of all the parties, Judge Parker issued an order in which he indicated that he would determine only the factual issues raised in the record before him, and return the record to the Board without an ultimate revenue requirement recommendation. Those issues to be decided included (1) the appropriate level of cash working capital allowance; (2) Oyster Creek depreciation rate; (3) the appropriate level of construction work in progress (CWIP); and (4) the rate of return.

In addition to the aforementioned TMI-I stipulation, the parties reached an agreement on the tariff design issues on March 5, 1982.

Evidentiary hearings on Stage III, the TMI issues retained by the Board, were held on May 10, 14 and 26, 1982, at which time testimony was elicited from Company and Public Advocate witnesses regarding:

1. The regulatory treatment of the TMI-I and the issue of TMI-I depreciation in Docket No. 818-736.
2. The regulatory treatment of the investment in TMI-II.
3. The TMI-II decontamination costs.

The complexity of this case and its division into three discrete segments for hearing purposes results in the need to examine each stage separately. The ensuing discussion will be on a stage basis.

II. STAGE I (TMI-I)

The parties in Stage I stipulated to a non-contested rate base of $96,284,000. During the Stage III proceedings, Petitioner presented testimony in support of TMI-I related costs that were not included in the stipulation submitted to the Board on January 8, 1982. These included certain plant additions and projected investments since September 30, 1981 through June 30, 1982 totalling $6,581,000; completed nuclear fuel assemblies in the amount of $11,474,000; depreciation adjustment related to the proposed change in the depreciation rate; and, certain health and safety—operating and maintenance expenses incurred at TMI-I from May, 1980 to December, 1981 in the amount of $7,630,000.

1. Plant Additions

A review of the record in Stage II and Stage III leads the Board to find that the $6,581,000 of plant additions placed into service as of June 30, 1982, should be included in the calculation of Petitioner's TMI-I rate base. Testimony of Petitioner's witnesses indicates that these additions represent costs associated with

TMI-II "lessons learned" required by NRC applicable to all nuclear facilities and also unique to TMI-I.

2. Health and Safety Operation and Maintenance Expense

Petitioner is seeking to recover certain operating and maintenance (O&M) costs related to the public health and safety of the unit and costs incurred for restart, from May, 1980 to December, 1981. It proposes that these costs be capitalized and amortized over 21 months, which is the length of the period during which Petitioner incurred these costs. The treatment, sought by Petitioner is purportedly due to the extraordinary levels of expense and to the nature of the items.

The Public Advocate argued that the Board was explicit in its Decision and Order of April 1, 1980, in Docket No. 795-427, when it ordered that the TMI-I investment and associated O&M be removed from base rates, and therefore, the health and safety O&M should be disallowed. It did, however, suggest that an amortization period, of 5 to 8 years, without rate base treatment would be appropriate if the Board chose to recognize these costs.

Staff was in basic agreement with the Public Advocate's amortization position. It agreed with the Public Advocate's interpretation of the Board's April 1, 1980 Decision and Order, in that the ratepayers were not to bear any costs related to the TMI-I investment or O&M until such time as the unit resumes operation and is returned to rate base. The record shows that the O&M costs were incurred for quality assurance, training and other safety expenditures required prior to restart. Therefore, the Board will recognize the health and safety O&M as legitimate costs to be recovered throught the base rates *when* TMI-I is returned to rate base.

We reject Petitioner's request to capitalize the unamortized balance and the 21-month period of recovery. As the Public Advocate pointed out — , "The expenses which are amortized to future periods for ratemaking purposes . . . are recognized in rates through an amortization process which does not involve a return

on an unrecovered balance." (RCT-2A, Page 16) This has been the Board's position relative to these types of amortizations. Likewise, the period for recovery in those instances as noted in the record, has been 3 to 5 years. However, we are persuaded by the Public Advocate's and Staff's argument hereto and feel that the upper bound suggested (8 years) is not an unreasonable recovery period and reflects the Board's sharing philosophy which we have employed since the TMI accident in 1979.

3. Depreciation on TMI

The Petitioner proposed a change in the calculation of its depreciation rates to 3.33% to reflect its level of investment through 1984. This issue was also litigated in Stage II before the Administrative law Judge regarding Oyster Creek investment through 1984. In both instances, Petitioner's argument would result in the recovery of its total investment over the remaining life of the plants.

Staff and the Public Advocate argue that only end of test year investment (as of June, 1982) be recognized in the calculations resulting in a 3.29% rate. After review and consideration of the recommendation and reasoning of the Administrative Law Judge in his discussion of the issue in Stage II, the Board adopts the position of Staff and the Public Advocate. To go beyond the test year levels of investment would be too speculative and contrary to accepted regulatory policy.

4. Nuclear Fuel

Petitioner in its Stage I request, includes in its rate base calculation $24,763,000 for nuclear fuel. In the stipulation submitted to the Board on January 8, 1982, the uncontested nuclear fuel was reflected as $13,287,000. The balance of $11,474,000 that Petitioner seeks to earn a return on represents 103 completed fuel assemblies presently being stored off-site. This represents two refuelings (⅔ of the core). Petitioner testified that because the assemblies are complete, it must cease booking AFDC and

requests rate base treatment as if it were plant or nuclear fuel in service.

The Public Advocate noted that Petitioner normally had 25 to 30 spare assemblies on site after a refueling. (TMI-I had just been refueled at the time of the accident). The Public Advocate further argued that the fuel will not be used until 1984 or 1985 at the earliest because the unit has a full core and will not be refueled until 10 months after restart, at which time one-third of the core will be replaced. Therefore, it argues that to permit Petitioner to earn a return on this investment would be improper in that the fuel is not currently used and useful.

The Staff agreed with the position of the Public Advocate but would allow ⅓ of the core or $5,737,000 in the calculation of TMI-I related rate base.

After review, the Board finds that Staff's position on this issue is meritorious and will adopt it. Assuming a restart of TMI-I during the first quarter of 1983 as now appears likely, this portion of the fuel assemblies would be installed in the facility during its first post restart fueling. This would occur during the first quarter of 1984 or within the foreseeable future.

Therefore, based upon the foregoing, the Board finds that the total net investment of TMI-I Unit I based upon additions through the test year ended June 30, 1982 to be utilized in adjusting the Petitioner's rate base when Unit I returns to service is $108,602,000, and that the income requirement based on the foregoing adjustments and the rate of return discussed following is $12,293,000.

III. STAGE II

Those issues remaining in controversy are:

1. Construction Work in Progress (CWIP)

Petitioner, in Exhibit JC-201 showed Construction Work in Progress (CWIP) to be $89,124,000. This figure was subsequently reduced to $80,300,000 which includes the following:

Generating projects not accruing AFDC	$ 57,000
Projects under $5,000 (No AFDC accrued)	25,812,000
Projects waiting and/or in service—not complete	9,216,000
Accumulated AFDC	9,281,000
Investment in Nuclear Fuel Raw Materials	35,934,000
	$80,300,000

Petitioner does not book AFDC on small projects of short duration. Traditionally, these have been projects that cost $5,000 or less. The record shows that Petitioner's CWIP in which carrying charges (AFDC) are not now being booked is $25,812,000 at test year ended June 30, 1982. The Public Advocate excluded the $25,812,000 from its CWIP calculation. It contends that there is no accounting practice or procedural impediment for Petitioner to accrue AFDC on these projects. While this may be the case, Petitioner does not now book AFDC on small projects of short duration, and has not sought to change this policy. The issue was also raised by the Public Advocate in Petitioner's last base rate case. The Board, in that matter, decided to continue treating those costs in the manner set forth by Petitioner in this pending case. After review, we see no reason to deviate from our prior position and therefore adopt the Staff and the company's position.

Petitioner's inactive work orders total $3,886,000 and its "work orders in-service-not completed" amount to $5,330,000. The former represent projects which have been suspended with no work performed for more than three months. The record does not indicate when activity will resume on these work orders. The Advocate and Staff, therefore, eliminate the $3,886,000 from its recommended level of CWIP. As to the remaining $5,330,000, this represents projects which should properly be considered plant-in-service; however, the Petitioner's bookkeeping practices prevent such designations. The Advocate and Staff have included this amount in their rate base calculations.

Petitioner also includes in its CWIP calculation accumulated AFDC of $9,281,000. In effect, Petitioner is seeking a return on previously booked AFDC applicable to construction projects not yet completed. The computation to book AFDC on the accumulated AFDC, is made twice a year in accordance with Petitioner's present policy. The Public Advocate's witness recommended that the Board permit Petitioner to compound AFDC monthly and, therefore, recommended elimination of the above amount from CWIP. The Staff rejected this position, arguing that the Board has not permitted the compounding of AFDC on a monthly basis. We agree with Staff and adopt this position.

The last element included in Petitioner's CWIP is nuclear fuel in process, which equates to $35,934,000. This represents investment in nuclear fuel and raw materials for TMI-I and Oyster Creek. The Public Advocate recommended that this nuclear fuel in process should not be included in CWIP calculations. It contended that current customers should not have to pay for this additional investment at this time in view of the uncertainty surrounding the restart of TMI-I, and the questionable status and reliability of Oyster Creek. Staff concurred in this view.

After review, we find the Staff's and Advocate's position on nuclear fuel to be persuasive. Petitioner expects that, during the next 36 months, Oyster Creek nuclear station will be out of service for approximately 20 months. Further, TMI-I restart has been delayed due to legal and technical problems. To require the present ratepayers to absorb the cost of this investment at this time would be unjustifiable.

The question of nuclear fuel assemblies currently in storage and nuclear fuel in process is troubling to the Board. Considering the questionable status of the Petitioner's nuclear program (restart of TMI-I and II and the forecast extended outages at the Oyster Creek facility), the Board would direct the Petitioner to investigate the possibility of selling all or part of the inventory currently on hand. Such a sale would give an immediate positive cash flow advantage to the Petitioner and serve to reduce the level

of short term borowings. The Petitioner is to report to the Board within 90 days on potential buyers contacted.

2. WORKING CAPITAL

Petitioner's filing initially reflected a level of Working Capital in the amount of $149,093,000 which was modified to $150,756,000. Both analyses include an appropriate amount for materials and supplies, and cash working capital based upon the FPC ⅛ of operating and maintenance expenses method of $96,153,000. However, the Petitioner, in response to the Public Advocate's request X-79, provided the various leads and lags associated with Petitioner's revenue and expense accounts for the calendar year 1980. Based on the above mentioned lead-lag study, the Public Advocate argued that the cash working capital allowance should be $44,495,000. The Public Advocate calculated the lag period for 1980, from the midpoint of 1979 to each payment date, concluding that the weighted tax lag period is 187.4 days.

In view of the fact that the lead-lag study (X-79) represents Petitioner's calendar year 1980 operations, Staff argued that it is more appropriate to begin the calculation of the lag period at the end of 1979 or from the beginning of 1980.

The Administrative Law Judge adopted the Public Advocate's reasoning regarding the use of a Lead-Lag study but recommended a further adjustment reflective of the Petitioner's assertion that funds accrued for the payment of debt interest and preferred stock dividends should not be included in the cash working capital analysis. Staff and the Advocate argued that these funds are available for general corporate use until actually paid and as such should be included.

We concur with the position of Staff and find that the lag period for all taxes is 114.9 days. We further adopt the position of Rate Council and Staff as regards the treatment of funds for debt and preferred stock payments.

Based upon the foregoing, the cash working capital required by Petitioner equals $66,740,000 and the total working capital allowance is $120,731,000.

3. *The Depreciation Rate on Oyster Creek*

As stated by the Board in its discussion of the treatment of TMI depreciation, we adopt the position of Rate Counsel and Staff regarding the use of test year end investments in the calculation of depreciation rates. Therefore, we adopt the ALJ's recommendation and find a 3.75% rate to be reasonable.

4. *Rate of Return*

The parties in this proceeding faced the continuing difficulties of estimating a market oriented cost of capital for a company that has limited access to traditional money and capital markets. Further complicating the issue are the apparent differences of opinion regarding the present stage of the recovery of JCP&L and, in fact, the ultimate desirability of accomplishing that recovery. The Board has reviewed the record on these issues and determined that the costs of capital and capital structure set forth below adequately meet the legal and regulatory standards associated with the issues:

Capital Structure (000)		Per Cent Weight	Cost (%)	Weighted Cost
Long-Term	$ 893,000	47.40	8.41	3.99
Short- Term Debt	20,000	1.06	17.00	0.18
Preferred Stock	200,000	10.62	9.08	0.96
Common Stock	685,944	36.42	17.00	6.19
Cost Free Capital	84,690	4.50	—	—
	$1,833,647	100.00%		11.32%

In reaching its determination on the appropriate return on equity for JCP&L, the Board considered the following factors:

(1) Current and prospective bond ratings of JCP&L (Moody's: Ba and S&P: BB-).

Recent long-term "BBB" rated utility bonds are yielding near 18 percent. Even utility bonds rated "AAA" are priced to yield in excess of 16 percent. It, therefore, appears obvious that the Public Advocate's return on equity assessment of between 14.84 to 15.69 (recommended 15.69) was insufficient when filed (Staff Position: April 7, 1982, p. 10), and capital markets have not produced interest rates to support that assessment. Reestablishment of investment grade debt ratings will benefit ratepayers in lower costs of capital.

(2) Very limited access to traditional money and capital markets.

It is clearly the intent of the Board to mitigate the long-term costs of capital to the Petitioner. However, this cannot be accomplished in one Board Order covering say the next year or two. Therefore, the Board must systematically deal with the Petitioner's financial problems in a consistent and realistic way. Our rate of return determination is totally reflective of that position. Ratepayers will benefit from this strategy.

(3) Current and prospective high market interest rates.

All of our regulated utilities face the market-determined costs of capital. Current economic forces have produced interest rates which the utilities must pay if they intend to attract the capital required to meet their franchise responsibilities. This is clearly a fact facing the Petitioner. Although at times unpopular, the Board must exercise its authority to asess these market-determined costs on the users of utility services. Petitioner faces substantial problems which require voluntary capital. The Board cannot ignore these legitimate needs.

(4) Substantial risks associated with JCP&L's nuclear properties (i.e., TMI-I, TMI-II, and Oyster Creek).

The record fully supports these risks and their impact on the firm's cost of capital. Our determination on rate of return is a reasonable estimate at quantifying these risks. We are hopeful that these risks will be substantially reduced as a result of the Petitioner's efforts to expeditiously restart TMI-I and minimize the downtime of Oyster Creek. The Board will continue to support all efforts

aimed at mitigating these risks and passing on the benefits to JCP&L's ratepayers.

(5) Continuing need to assure safe, adequate, and proper service via substantial long-term purchased power agreements.

The Board has continually insisted that the Petitioner pursue all purchased power agreements that will result in lower cost power and energy. In order to successfully execute this responsibility, the Petitioner must negotiate contracts for five and ten years into the future. Ratepayer benefits should not be foregone because the company is viewed as incapable of meeting these contractual agreements.

The overwhelming evidence in the record supports our determination that a return on equity of 17% and an overall return of 11.32% are reasonable approximations of the Petitioner's costs of capital. As noted previously, the differential risks faced by JCP&L are greater than most electric utilities. The Board's recent action in Docket 812-76 indicated its assessment of the record evidence concerning the cost of equity to PSE&G, namely 16.0% (*Decision and Order*, February 11, 1982, p. 8). Our underlying assessment of the record evidence in this proceeding clearly indicates the unrebuttable higher risk faced by JCP&L.

IV. STAGE III (TMI-RELATED ISSUES)

The issues before the Board in Stage III are:

1. The regulatory treatment of TMI-I and the issue of the cessation of depreciation in Docket No. 818-736.
2. The regulatory treatment of TMI-II.
3. TMI-II decontamination costs.

1. Return of TMI-I to Rate Base

The discussion in the Stage I section set forth those isues that were not stipulated by Staff, the Public Advocate and Petitioner. The question of the timing, that is, when the TMI-I unit will be returned to rate base must also be determined. Staff suggested that the commercial operation of the unit would be the triggering

event. The Public Advocate pointed to the recent Petition for Settlement in Pennsylvania wherein the return to rate base would be guided by the following:

1. An order issued by the NRC authorizing normal operation of the plant.
2. The plant has begun to produce electric energy for the system and achieves and maintains a capacity factor of 35% for at least 100 consecutive hours; and
3. The company has given 10 days notice of a rate change to the Board and to all parties to the proceeding.

The Advocate would desire a similar set of circumstances before the Board would act on a return to service of TMI-I.

The Petitioner argued as it has done since January 1980, when the Board removed TMI-I from rate base, that the unit should not have been removed and should immediately be returned to rate base. We cannot find any merit in Petitioner's arguments.

We adopt the Advocate's position and employ the restart criteria developed in Pennsylvania. As we have stated before, when the unit returns to commercial operation after the NRC issues the necessary approvals, an expeditious hearing process will be instituted, the facility's status, i.e., rate base inclusion will be examined, and if appropriate, will be recognized.

2. TMI-II INVESTMENT

Petitioner, in its Stage II testimony and more recently in the Stage III proceeding, requested an increase in annual revenue of $35.3 million to reflect a recovery on its TMI-II investment. Petitioner believes that the investment in TMI-II should be included in rate base as "Plant Held for Future Use" (FERC Account 105).

Petitioner alternatively suggested that the Board permit the amortization of the TMI-II investment with carrying costs associated with the unamortized balance, in an amount equivalent to the $35 million initially requested, if the Board determined that it was inappropriate to recognize TMI-II as plant held for future use.

The Public Advocate argued that the investment does not fit the definitions of plant held for future use as set out in the *FERC Uniform System of Accounts*. Account 105 refers to "...definite plans, never used and retired." (RCT 24 p. 21). The Public Advocate's witness suggests that nothing is definite as to the status of TMI-II. No decision has been made regarding restart or reconstruction. Although technically feasible, the financial and regulatory problems may inordinately delay or even preclude such action. Additionally, the facility is not one which was "never used" and is not "retired."

As to the Petitioner's alternate proposal, the Public Advocate compared it to the treatment sought by Petitioner and other New Jersey utilities for abandoned plants or projects, arguing that the same cost recovery methods should be applied to TMI-II. That is, Petitioner should not be afforded a return on carrying charges on any unamortized investment. The Staff concurred in this view.

After careful review, the Board finds no compelling reasons to alter its policy that the financial impact associated with the TMI accident should be shared by ratepayers and stockholders. The Board has consistently allowed the pass-through of reasonable replacement energy costs to maintain service for the ratepayer. It has disallowed a return on Petitioner's investment in the TMI facilities sitting idle since March 28, 1979, in recognition of what we believe is the equitable sharing of the cost of the accident.

Given the uncertainty of the future of this facility, it would be unfair to ask the ratepayer, who is the innocent victim of this dilemma, to fund both the replacement power and the investment costs. The investor has borne a share of the consequences from the accident as has the ratepayer. We feel that a balance must be maintained in assessing this loss. To make a mid-course adjustment now would, in our opinion, destroy the foundation of the sharing concept which we have carefully fashioned for 2½ years.

We will therefore adopt the recommendation of the Staff and Rate Counsel. If, in fact, Petitioner at some future date, decides

to abandon the TMI-II facility, the Board will at that time undertake a full investigation into the circumstances surrounding the accident before making any decision.

3. TMI-2 DECONTAMINATION

Petitioner proposes that it be allowed to recover, through rates, $13.8 million annually (including revenue taxes) for a five year period covering its proportional (25%) shares of TMI-2 decontamination costs as contemplated in the Bradley-Heinz cost sharing bill currently pending before the U.S. Senate, under the provisions of the Thornburgh Plan.

The Public Advocate, through its witness, did not provide a specific recommendation for decontamination or clean-up costs. The record indicates the Public Advocate continues to argue that Petitioner cannot pass on to customers any TMI accident-related costs, including decontamination costs, without a resolution by the Board as to whether negligence or mismanagement contributed to the accident at TMI-2. The Public Advocate's witness, however, did testify that the dollar allowance for decontamination costs would be added to his revenue recommendation in Phase II, should the Board allow some level of cost to be recovered.

The Staff position, while approving and supportive of the sharing concept, would not have provided for recovery of this cost until all other participants under the plan pledged their shares. The Board, however, finds that, as difficult as it is to impose additional costs on these already burdened ratepayers we can no longer ask others to share what we are unwilling to undertake.

Since the accident in March, 1979, the Board has advocated a sharing philosophy regarding this event. It has attempted to ask both ratepayers and stockholders to assume part of the financial burden of the accident. Before now, however, we have *never* asked the ratepayers to participate, through rates, in the clean-up effort.

Each Commissioner has testified in Washington before Congressional Committees as to our belief that the costs of the clean-

up must be shared. We have embraced Governor Thornburgh's sharing plan under which the Federal government, the residents of both Pennsylvania and New Jersey, the nuclear industry and the ratepayers of Jersey Central Power & Light, Metropolitan Edison and Pennsylvania Electric would all contribute a share to the clean-up effort. Substantial federal funds have already been pledged.

The budget of the State of Pennsylvania includes a line item for its share of clean-up costs. The potential for additional funding exists.

However, there is a clear requirement in Washington that to ask ratepayers in other states to share part of the clean-up effort while the New Jersey ratepayers refuse to contribute is not only unfair but unwise. Our continued refusal clearly jeopardizes hundreds of millions of dollars in contributions which would serve to tremendously reduce the burden to Jersey Central Power and Light ratepayers in the long-run. To fail to participate may well mean the Thornburgh Plan will never be implemented and we will have lost this opportunity to spread the costs over a broad base of interested parties.

We recognize and appreciate the support of Governor Thomas H. Kean in his full endorsement of the Thornburgh Plan. The Public Advocate Joseph Rodriguez has also publically supported the sharing concept of the Thornburgh Plan and its ramifications. We are cognizant of the impact of that support.

We note that the average residential customer's bill will increase $6.00 a year with this allowance for clean up, or $.50 per month. However the real cost will be even less. From testimony before both State and Federal governmental officials, it is clear that they perceive the funding of TMI-II as a major impediment to the recovery of this utility. If the investment community feels that the risk of JCP&L is reduced, the cost of borrowing by the company and the ultimate cost to the ratepayer will be reduced.

We shall direct that the Petitioner set up an escrow account for the funds collected for decontamination, this account will be administered by the Board, the administrative details of which

shall be decided by the Board. Any other funds, from whatever external sources which may hereafter be made available to the utility for decontamination, shall also be placed in the account. This will ensure that funds collected for decontamination will be used exclusively for that purpose.

4. Nuclear Industry Contributions

The Board notes in further consideration of the sharing concept however, that in our opinion, the nuclear industry as a whole has not been as supportive as we would have hoped. Therefore, at the September Edison Electric Institute meeting, we shall request that the industry voluntarily contribute to the sharing plan. It is our intention to discuss with New Jersey utilities the necessity for such an endeavor on the part of the industry. Failing a positive response, in the future New Jersey utilities will no longer be permitted to pass through the cost of their membership dues in EEI or EPRI assessment to their ratepayers. These dues are used in part for research and development.

In the opinion of the Board, the TMI situation provides an area of research which is unparalleled in technological and economic impact.

5. Cessation of Depreciation on TMI-I

As part of Docket No. 818-736, Petitioner, the Public Advocate and Staff have agreed as part of the stipulation in Stage I on the treatment of cessation of depreciation on the TMI plants. After review, we adopt this position.

6. Old Deferred Energy

The Advocate recommended that $18,162,000 of old deferred energy expense be removed form Petitioner's operating expenses and the balance transferred to the currently pending LEAC proceeding, Docket No. 821-75. Staff and the Petitioner agree with this recommendation.

Therefore, the Board directs Petitioner to include the balance in that account in its calculation of the pending LEAC, Docket No. 821-75, decision on which can be anticipated by September 1, 1982.

7. Oyster Creek Repairs

During the pendency of this matter, it became apparent that extensive repairs would have to be undertaken on the Oyster Creek nuclear plant during its next two scheduled refueling outages. The extent of those repairs is of such concern to the Board, that we will direct the Petitioner to inform us before undertaking any repairs of their nature and anticipated cost. An overview reporting system will be set up by the Division of Electric and Petitioner to insure timely reporting of the ongoing status of these repairs.

8. Tariff Design

The tariff design stipulation (Att. 1) signed by the parties on March 5, 1982 is a reasonable resolution of the issues. First, it sets equitable standards for the allocation of revenue increases to each customer class. Second, it continues the further cost definition in the design of individual tariffs. This includes a further flattening of the General Service Secondary tariff, demand-energy charge allocation for General Service Primary and Transmission tariffs, and an increased inversion of the summer residential tariff. The latter is a step in setting a price signal to the high summer user which reflects the increased cost of on-peak service.

Finally, this stipulation includes additional loan management initiatives. Mandatory time-of-day rates for newly constructed electric heat or hot water residences and the capacity offset mechanism to encourage storage water heating are both significant efforts to manage load to off-peak and thus avoid the cost of additional capacity.

The Board will adopt this stipulated tariff design submitted by the parties.

V. SUMMARY

Based upon the full record in this proceeding, Stages I, II, and III, a review of the ALJ's Report and Recommendation and the exceptions filed by the parties, the Board *HEREBY FINDS:*

1. The fair value rate base for the purposes of this proceeding excluding the TMI units is $1,324,714,000.
2. The fair rate of return applicable to the rate base found herein is 11.32%
3. A rate of return of 11.32% applied to a rate base of $1,324,714,000 allows operating income of $149,958,000 or an increase of $68,822,000 in annual operating revenues.
4. The Petitioner may recover, through rates, an additional $13,854,000 per year for five years to be placed in an escrow account for the clean-up at TMI-II pursuant to the rationale of the Bradley Heinz "Thornburgh" cost sharing plan.
5. The Tariff Design Stipulation, submitted March 5, 1982 and entered into by the active parties, is reasonable and in the public interest.
6. TMI-I shall not be returned to the Petitioner's rate base until such time as it resumes commercial operation and the Board has reviewed its status.

Therefore, based upon the foregoing, the Board *HEREBY AUTHORIZES* an increase in rates as specified in this Decision and Order and *HEREBY ACCEPTS* the tariffs submitted in accordance with the rate design herein.

The Board *HEREBY DIRECTS* that the fuel costs of the existing LEAC be rolled into base rates in the amount of 5.676 mills per kwh.

DATED: July 22, 1982
(SEAL)

BOARD OF PUBLIC UTILITIES
BY: (SIGNED)

BARBARA A. CURRAN
PRESIDENT

GEORGE H. BARBOUR
COMMISSIONER

EDWARD H. HYNES
COMMISSIONER

ATTESTED:
(SIGNED)

TERESA M. SELLMEYER
ACTING SECRETARY

JERSEY CENTRAL POWER AND LIGHT COMPANY

Revenue Requirement Summary

(000's)

	Stage II (Attrition)	Thornburgh Plan TMI-II Clean-Up	Total
Rate Base	$1,324,714	—	$1,324,714
Rate of Return	11.32%	—	11.32%
Income Requirement	$ 149,958	—	$ 149,958
Pro-Forma Income	$ 117,165	—	$ 110,564
Income Deficiency	$ 32,793	$ 6,601	$ 39,394
Revenue Factor	2.0987	2.0987	2.0987
Revenue Requirement	$ 68,822	$13,854	$ 82,676

Appendix D

DECISION ON MOTION

STATE OF NEW JERSEY
DEPARTMENT OF ENERGY
BOARD OF PUBLIC UTILITIES
1100 Raymond Blvd.
Newark, New Jersey 07102

BPU DOCKET NOS. 795-427
BPU DOCKET NOS. 804-285
BPU DOCKET NOS. 811-25

IN THE MATTER OF THE PETITIONS OF JERSEY CENTRAL POWER & LIGHT COMPANY FOR INCREASES IN ITS LEVELIZED ENERGY ADJUSTMENT CHARGE AND ITS BASE RATES.

(Appearance List Attached)

BY THE BOARD:

The Public Advocate by Motion of March 2, 1981 joined the County of Ocean in moving before the Board for the following relief: (1) That the Board undertake a formal proceeding to determine the culpability or "fault" that can be attributed to petitioner relating to the nuclear accident at Three Mile Island, Pennsylvania, which, to this date, has kept both TMI Units I and II out of service; (2) That the Board in effect, "freeze" petitioner's rates by deferring consideration of the current energy adjustment docket and base rate docket until completion of the requested "fault" proceeding.

The Advocate, in a series of moving papers, has urged that the Board is precluded as a matter of law from fashioning rate relief in the current energy adjustment proceeding and base rate proceeding even if otherwise justified, unless and until it makes a

finding as to the degree of culpability, if any, that should be attributed to petitioner, related to the TMI-2 accident.

The thrust of the movant's position is that the Board is legally required to determine the question of management prudence and, therefore, must initiate the requested proceeding. The argument runs that if the Board finds fault on the basis of the requested proceeding, the Board would then be required to attribute a substantial portion of the replacement purchase power costs already reflected in rates, and pending for Board consideration,[1] to the utility itself, with a consequent reduction in ratepayer costs.

The Advocate has also moved for denial of the proposed base rate increase in toto, on the grounds that it includes in rate base, TMI-1 capital costs, contrary to the Board's Order of April 1, 1980 in Docket No. 795-427, which removed these capital costs from rate base. This portion of the Advocate motion is *DENIED*, since the Board will evaluate this issue, as well as other substantive issues, in the context of its final determination in the base rate docket.

The board has concluded, for the legal and policy reasons set forth below, that it would be counterproductive to the public interest, procedurally unmanageable and undermine those positive efforts under way to share the cost burdens of the TMI accident, to grant these motions. These motions are consequently *DENIED* in full, based upon our current evaluation.

We will set forth our reasons which led us to conclude that these motions should be denied.

First, the benefit to the customer of receiving reliable electric service requiries a utility healthy enough to provide that service. Embarking on a fault investigation of a nuclear accident, a most complex endeavor at best, and freezing currently pending rate cases until such a proposed investigation is completed, is not in the public interest. Such a course could be of no real benefit to

1 Pending before the Board in Docket No. 811-25 are proposed increases in the Levelized Energy Adjustment Clause: and in Docket Nos. 795-427 and 804-285, the base rate case will shortly be referred to the Board for determination by the Office of Administrative Law. We are dealing here with interlocutory motions filed in both dockets.

the ratepayer, since reasonable replacement power costs must be paid for if ongoing service is to continue. We have outlined below those initiatives that can be of help to the hard-pressed customer, such as returning TMI-I to service, the success of pending law suits, the benefits of which will flow through to the ratepayer, and federal initiatives to share the burdens of the TMI accident.

Balancing the interest of customers in refunds anticipated from a penalty action against the need for an ongoing utility to provide ongoing service, leads us to deny these motions.

The Supreme Court on April 8, 1981 has held action similar to that we take today to be reasonable and proper and as well within the bounds of Board discretion.[1] The Supreme Court held in this matter that removal of TMI-I from rate base, coupled with the accelerated amortization of JCP&L's deferred energy balance, was a reasonable resolution of a unique policy question, well within the Board's discretion, which properly balanced the level of rates placed upon JCP&L rate payers against the need to maintain the utility to provide safe, adequate and proper service to the public.

We believe our action today, which is a continuation of our determination to carefully balance these interests, is also well within the Board's discretion. As the Court stated on Page 7, of its Opinion.

> In *Public Service Coordinated Transport* v. *State*, 5 *N.J.* 196 (1950) this Court observed that "rate making is a legislative and not a judicial function, and that the Board of Public Utility Comissioners, to which the Legislature has delegated its rate-making power is vested with broad discretion in the exercise of that authority". *Id.* at 214. Thus, the Board's rulings are entitled to presumptive validity and will not be disturbed unless we find a lack of "reasonable support in the evidence." *In re New Jersey Power & Light Co.*, 9 *N.J.* 498, 609 (1952).

1 *In the Matter of the Petition of Jersey Central Power & Light for the Amendment to Energy Adjustment Clause*, N.J. (April 8, 1981)

What has been placed at issue here is the appropriateness of permitting the recovery of replacement purchase power costs for TMI-I after we have removed the capital costs of TMI-I from rate base. This was the very issue before the Supreme Court, *supra*, in which it affirmed the Board's discretionary powers to act.

In *Daaleman* v. *The Elizabethtown Gas Company*, 77 N.J. 267 (1978), the New Jersey Supreme Court stated at page 569:

> Punitive assessments against it are counterproductive because, in the long run, it is the public users of the utility service on whom the punitive award will fall. No matter how such award is molded to avoid a "pass through" of the punitive damages, the financial structure of the utility will be affected with resultant loss of investor appeal and higher interest rates for borrowing, all of which will ultimately be reflected in the rates charged consumers.

Under present circumstances, we conclude that the proposed "penalty" investigation of this utility is not in the public interest.

Second, the Board has not ignored the rate consequences to the customer flowing from the TMI accident. After notice and hearings, we removed TMI-II from rate base on June 18, 1979, Docket 795-427. Furthermore, on April 1, 1980, we removed TMI-I from rate base on the basis of a "used and useful" approach. We held in this Docket No. 795-427, Phase II, that this facility, though unaffected by the accident, could not continue to earn a rate of return with a consequent cost to the rate payer, since there was not any reasonable expectation that it would return to service in a reasonably foreseeable period of time. We pointed out that it would be inequitable for the customer to bear the capital cost of TMI-I, as well as the replacement energy costs associated with the unit being out of service. We further prohibited the payment of dividends from JCP&L to the parent corporation GPU.

Third, this ruling is consistent with the position taken by the Pennsylvania Public Utility Commission, which has direct jurisdiction over the site of the accident as well as over the utility, Metropolitan Edison, which was in operational control of these

facilities. In Docket I-79040308 the Commission by Order of February 8, 1980, clarified a previous Order, in which the Commission determined it would not initiate an independent "fault" proceeding regarding the TMI accident. The Commission stated at page 3:

> Our order was no more than a statement that we do not intend to reach an independent conclusion with respect to the design, construction and operation of the plant, at a time when those matters are under active consideration by the agency charged with direct authority over them. We may, however, wish to consider the conclusion of that agency at a later time. We will not voluntarily embark on this record on an exploration of very technical matters beyond the normal expertise of this agency in the hope that some sort of conclusion might be drawn as to the management capability and prudence of Respondents.

Furthermore, in the same docket by Order of May 9, 1980, the Commission concluded as follows with respect to the "fault" question, at Page 25:

> If the courts and/or the NRC should ultimately conclude that Met Ed was imprudent or negligent in its operation or management of Three Mile Island, then this Commission will take notice of such determinations and their relevance to any portion of the replacement power costs for which current recovery is permitted today.
>
> Any subsequent examination of these issues would have to be made with the public's interest in the continued provision of adequate, reliable electric service clearly in mind. This Commission recognizes the close relationship between that public interest and Met Ed's financial viability, and, if necessary, would balance the public's interest in adequate, reliable service against its interest in refunds.

In short, the reasoning of the Pennsylvania Commission closely parallels that of the New Jersey Supreme Court affirming this Board in its decision on April 8, 1981, *supra*.

Fourth, the Board concludes that the design construction and operation, as well as the development, use and control of nuclear

facilities is within the primary if not exclusive jurisdiction of the Nuclear Regulatory Commission. The Pennsylvania Commission stated flatly in its Order dated January 10, 1980, *supra*: "The design construction and operation of the nuclear reactor at TMI-II are under the exclusive jurisdiction of the Nuclear Regulatory Commission". We prefer to conclude that the Federal Atomic Energy Act, 42 *U.S.C.A.* 2011 *et seq.*, vests exclusive jurisdiction in the NRC only over activities reasonably related to the protection against radiation hazards; 42 *U.S.C.A.* 2021 (k). But certainly the Atomic Energy Act vest at least primary jurisdiction in the NRC by a pervasive regulatory scheme controlling the development of nuclear energy through the promulgation of detailed regulations.[1] Certainly this Board should defer to the expertise of the Federal Body, according to the concept of primary jurisdiction[2] in the interpretation of the standards it has set and whether or not the nuclear industry has met these standards in a reasonable fashion.

Fifth, there has been engrafted into the statutory framework requiring the Board to fix just and reasonable rates, *N.J.S.A.* 48:2-21, the "Hope Standards"[3] which require this Board to fix a level of rates that will provide for the financial integrity of the utility, provide it with the ability to finance needed construction, the opportunity to earn a reasonable rate of return and, most important, the ability to continue to render safe, adequate and proper service, *N.J.S.A.* 48:2-23. This utility system has not paid a dividend in two years. It has not, and cannot access financial markets to cover capital costs. It is paying expenses from a revolving line of short-term bank credit. This sole source of capital is based upon the bank's continuing evaluation of the utility's system revenue flow, which the movant seeks to restrict. If we were to stay even consideration of an appropriate level of purchase power costs and base rates in matters currently pending,

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1 *State* v. *Jersey Central Power & Light*, 69 N.J. 102, (1976) at p. 112, *Northern States Power Company* v. *The State of Minn.*, 447 F 2nd 1143 (8th Cir., 1971), at p. 1152.
2 *Woodside Homes* v. *Morristown*, 26 N.J. 529 (1958) at p. 541.
3 *Federal Power Comm.* v. *Hope Natural Gas*, 320 U.S. 591 (1943) at p. 603.

this could easily be interpreted by the banks as an "adverse change" permitting the banks to restrict their line of credit. Such a consequence would go to the very heart of the financial viability of this utility and its ability to serve its customers. We do not believe that the Supreme Court's holdings in the leading cases,[1] requires us to do otherwise. We recognize that adjustment clauses are provisional in nature pursuant to *N.J.S.A.* 48:2-21.1 and must, by a reasonable umbilical cord, be supported by ultimate statutory findings based in *N.J.S.A.* 48:2-21.

These are the basic relevant factors—financial viability, just and reasonable rates, safe, adequate and proper service—which the Supreme Court directed on April 8, 1981, *supra,* that we reasonably weigh in reaching our determination.

How can this Board meet its primary statutory obligation to see that safe, adequate and proper service is provided by a viable entity if it embarks upon the road proposed by the movants? The proposed procedure could either result in a morass of conflicting claims or some attribution of management imprudence to JCP&L, which, if effectuated in penalties, would jeopardize vital electric service.

Sixth, we have considered the procedural complexities of the proposed investigation of fault in ruling on this motion. Suffice it to say that we have an out-of-state accident, an overlay of primary federal authority, split ownership of the TMI facilities and management control of the facilities by a Pennsylvania utility. We also have the results of two major fault inquiries, which have not been able to isolate any particular cause of the accident. The ground has already been covered with mixed results.

The Kemeny Commission Report of October, 1979 utilizing the resources of a staff of over 200 experts and the Rogovin Report of January, 1980, utilizing a staff of 100 nuclear engineers

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1 *In Re Public Service Coordinated Transport,* 5 N.J. 196 (1950); *In Re Industrial Sand Rates,* 66 N.J. 12 (1974); *In Re Board's Investigation of Tele. Cos.,* 66 N.J. 476 (1975); *In Re Redi-Flo Corp.,* 76 N.J. 21 (1978).

and scientists, attributed the accident to a complex of intertwining factors including inadequately designed equipment, inadequate training of personnel, inadequate emergency room procedures, inadequate control room design and a system of divided responsibilities between the manufacturer, the Pennsylvania operator, the Nuclear Regulatory Commission, and the New York holding company.[1] We do not see much point in attempting to duplicate these efforts. Such an investigation would serve no public purpose since in the end reasonable replacement power must be paid for at current levels until there is a substantial reduction when TMI-I returns to service. After what we envision to be a protracted and complex proceeding we would still have to balance the customers interest in refunds or frozen rates due to the imposition of penalties and the need for a utility viable enough to provide service.

Seventh, initiating a fault investigation would be counterproductive to two pending law suits where the negligence question will be tried in a proper forum. General Public Utilities commenced action on March 25, 1980 against Babcox and Wilcox in U.S. District Court, Southern District of New York alleging various grounds of negligence, such as defects in design and improper control procedures. Consistent with appropriate regulatory policy, we believe that benefits flowing to the utility system from this law suit will be properly allocated to benefit the New Jersey rate payer. Likewise, the utility system filed suit on December 8, 1980 against the Nuclear Regulatory Commission under the Federal Tort Claims Act alleging negligent acts and omissions by the Staff of the NRC. Consistent with regulatory policy, recoveries from this law suit will be allocated to the benefit of the New Jersey rate payer. The inappropriateness of using this Board as a duplicate forum to try the negligence of the parties is evident.

We note that the suit against the NRC refers to a nuclear accident in September, 1977, at the Davis-Besse nuclear plant of Toledo-Edison. The suit alleges that if the nuclear industry at

1 Excerpts from the Kemeny Report are found in the Memorandum of the Public Advocate in Docket No. 795-427, dated February 19, 1980, Appendix A.

large, including the TMI operator, had been properly advised of corrective action to be taken as result of that accident, the TMI-II accident of March 28, 1979, could have been avoided. It is evident that question of fault is not a simplistic one and will be properly before the Federal Courts.

Eighth, on March 14, 1980, a consultant, Arthur Young, was retained to study all strategic options to provide continuing reliable service to the utility customers. The first portion of the study, dealing with bankruptcy options, which has been made available to the Advocate, concludes that bankruptcy would substantially add to rather than diminish rate payer costs as well as bring adequate service into question. The second portion of the study, which evaluates all other options, has just been received from the consultants. The Board will therefore be looking at every conceivable positive step that can be taken which would provide reasonable service at the most reasonable rate. Another fault investigation is not such a positive step.

If there is an attribution of fault to the utility on a federal level, the Board will evaluate the implications and consider such conclusions within the context of our evaluation of strategic options.

Next, there are many initiatives[1] at the federal level being sponsored through the New Jersey and Pennsylvania congressional delegation to provide a mechanism for the sharing of the costs of the TMI nuclear accident. Basic to these initiatives is the committment of the respective regulatory agencies that they will meet their obligations to keep the utility system viable. The various proposals to support the financial underpinning of this utility system will be stifled if there is an expectation that any financial aid will be dissipated because the utility will "go under" during the process.

Next, the Advocate has argued that we have expressed our intention to proced with a fault investigation. We note that on

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1. For example, H.R. 1814 introduced by Congressman Hughes of New Jersey is before the House Interior and Insular Affairs Committee. The bill provides for amendment to the Atomic Energy Act of 1954 and the Price-Anderson Act of 1957 to provide extended insurance coverage for purchase power replacement costs related to the TMI outage.

January 23, 1980, in Docket No. 795-427, the Board directed the parties to file prehearing memoranda on the fault issue, fully exploring the legal and factual contentions as well as the implications of such an inquiry. The submissions filed in response thereto, as amended by the newly filed motions, have aided us in reaching a determination. However, the Board has the statutory responsibility for dealing on a continuing basis with the utilities under its jurisdiction, and it must meet those responsibilities in the light of contemporary and evolving circumstances, with recognition that its primary duty is to exert all reasonable efforts to see that essential utility is preserved for the citizens of this State.

Unquestionably this Board and its staff have been required to devote more time, effort and resources to the problems occasioned by Three Mile Island than has ever been true during the approximately 70 years since the agency was created. It is not an exaggeration to say that we probably have a more intimate knowledge of the regulatory and financial problems associated with this utility than any other matters subjected to our jurisdiction. This has not been a matter of choice. It has been a matter of sheer necessity.

The deteriorating financial health of the electric utility industry in general, has recently been the subject of a Joint Board Conference by the Federal Energy Regulatory Commission and invited state commissioners, including the President of the Board. The electric utility industry is faced with eroding cash flow, lower bond ratings and diminished real earnings which impact on their ability to continue to provide efficient and reliable service. Within this context, we recognize the potential negative impact which would be felt in the capital markets if a major electric utility would be pushed to the financial brink through state regulatory action.

The Board will require the utility to develop and submit a plan for Board review as to the allocation of potential recoveries and benefits to the ratepayer from the above-noted law suits.

The Board will undertake a proceeding to intensively review and evaluate the strategic options now before us and provide interested parties with an opportunity to comment.

For the foregoing reasons, and based upon our current evaluation,

MOTIONS DENIED.

DATED: APRIL 23, 1981
(SEAL)

BOARD OF PUBLIC UTILITIES
BY: (SIGNED)

GEORGE H. BARBOUR
PRESIDENT

EDWARD H. HYNES
COMMISSIONER

BARBARA A. CURRAN
COMMISSIONER

ATTEST:

GERALD A. CALABRESE
SECRETARY

APPENDIX E

IN THE
SUPREME COURT OF NEW JERSEY

No. 21,691

JERSEY CENTRAL POWER & LIGHT COMPANY, APPELLANT,

v.

BOARD OF PUBLIC UTILITIES OF THE
STATE OF NEW JERSEY, APPELLEE.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Jersey Central Power & Light Company, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Jersey, denying Appellant's petition for certification and dismissing Appellant's appeal, entered in this action on December 6, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

/s/ EDWARD DEHOPE
EDWARD DE HOPE
RIKER, DANZIG, SCHERER &
HYLAND
HEADQUARTERS PLAZA II
SPEEDWELL AVENUE
MORRISTOWN, NEW JERSEY
07960-1981
TEL. (201) 538-0800
COUNSEL FOR APPELLANT

Of Counsel:
WILLIAM F. HYLAND
JAMES B. LIBERMAN

CERTFICATE OF SERVICE

I hereby certify that on the 5th day of March, 1984, copies for the foregoing Notice of Appeal were mailed, by first class mail, postage prepaid, to the Board of Public Utilities, State of New Jersey, 1100 Raymond Boulevard, Newark, New Jersey 07102, Attention: Ms. Blossom Peretz, Secretary. I further certify that all parties required to be served have been served.

/s/ EDWARD DEHOPE
EDWARD DEHOPE

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